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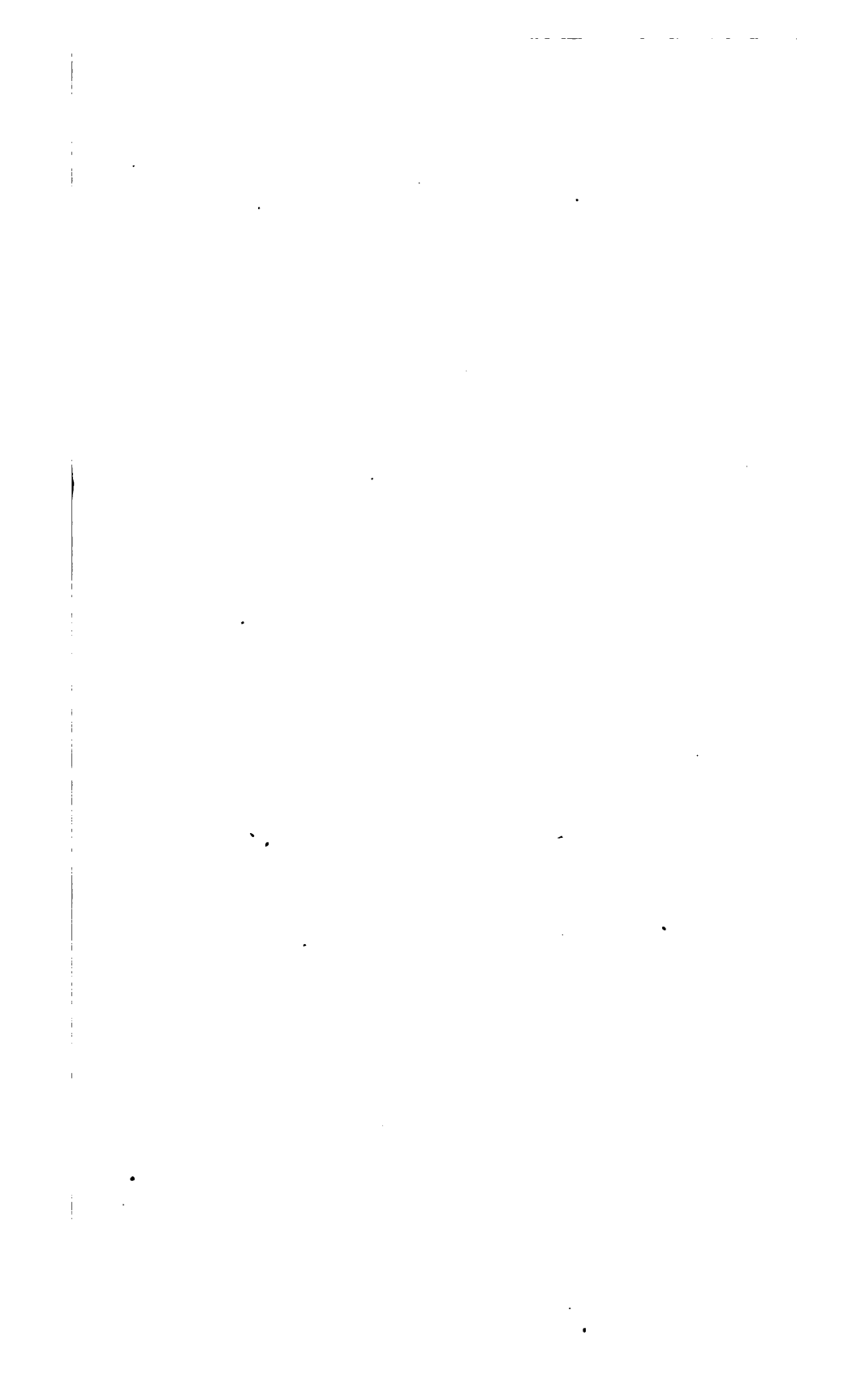
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THE
AMERICAN REPORTS:

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

ISAAC GRANT THOMPSON.

VOL. VIII.

CONTAINING ALL CASES OF ANY GENERAL IMPORTANCE IN THE FOLLOWING
REPORTS:

3 BUSH. (Ky.); 3 HEISKELL (Tenn.); 21 GRATTAN (Va.); 55 ILLINOIS; 56 ILLINOIS; 23 LOUISIANA ANNUAL; 59 MAINE; 100 MASSACHUSETTS; 48 MISSOURI; 49 MISSOURI; 7 NEVADA; 48 NEW YORK; 66 NORTH CAROLINA; 21 OHIO; 3 OREGON; 68 PENNSYLVANIA ST.; 60 PENNSYLVANIA ST.; 44 VERMONT.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1873.

121648

JUL 29 1942

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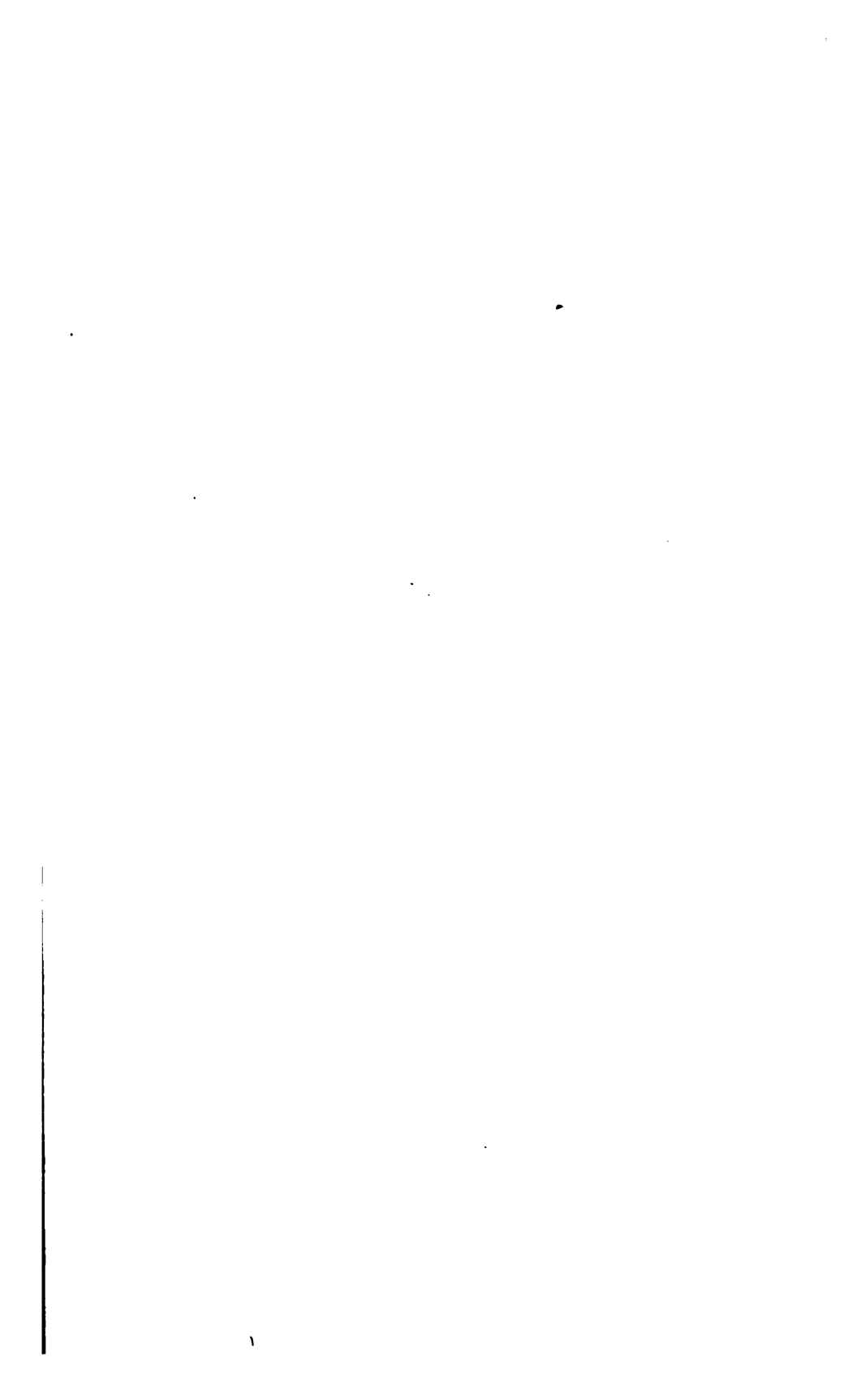


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CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

DEFRESE, appellant, v. STATE.

(8 Helak. 53.)

Larceny — obtaining property by a trick.

On an indictment for larceny it appeared that the prisoner and S., who were confederates, met the prosecutor; S. dropped a piece of paper, prisoner picked it up while S. had stepped aside and took from it a five cent coin; S., on returning, received the paper from prisoner, saying that "he would not take ten dollars" for it, and proceeded to bet that there was a five cent coin in it; prosecutor bet his watch, and the stakes were placed in prisoner's hands, whereupon S. tore open the paper, exhibited a five cent coin, which had been concealed therein, snatched the watch and walked off. *Held*, larceny.

INDICTMENT. The opinion states the case.

J. B. Heskell, attorney-general, for State.

E. C. Camp (*Wm. H. Maxwell* with him), for prisoner.

SNEED, J. The prisoner and one J. H. Smith were indicted in the circuit court of Knox county for the crime of robbery. They were both convicted of grand larceny, and adjudged to confinement in the penitentiary for five years. The prisoner appealed in error.

On the 8th of January, 1869, the prosecutor, James P. Johnson, a citizen of Union county, was in the city of Knoxville. About noon of that day, he started out of the city in his wagon, and had reached a bridge near Ingles' mill, when the defendant Smith came up to the wagon and asked permission to ride, which was given, and, in a few moments, the prisoner, Defrese, came up and also wanted to ride. The prosecutor observed that he would have to stop on top of the hill to wait for his brother, but gave his permission also to the prisoner to get in the wagon, which he did. Both of the defendants were strangers to the prosecutor, and he states in his testimony that, "from their looks," he was afraid of them. He, however, drove on, with one sitting on either side of him, until they reached the railroad, when the defendant Smith asked him if he had a pistol, to which he replied in the negative. At this moment, Smith got out of the wagon and appeared to be taking something out of his pocket. He walked in the direction of some houses near by and disappeared behind them. The prisoner remarked that Smith had dropped something. The wagon was stopped, and the prisoner picked up from the ground a paper folded in the shape of "a thumb paper," and remounting into the wagon, he opened the paper and took from it a five cent coin, which he put into his mouth, and then refolded the paper as before. About this time the party had reached the top of the hill where the wagon was halted. Here Smith came up, and the prisoner observed to him that he had lost something, at the same time handing him the folded paper. The defendant Smith replied, "Oh, yes, I would not take ten dollars for that paper," and proposed at once to bet ten dollars that there was a five cent piece in the paper. The prosecutor replied that he did not wish to bet, and that he had no money. He was then asked by Smith to show his watch. The prisoner and Smith both examined the watch, then handed it back, and the prosecutor replaced it in his pocket, observing that it was worth forty dollars. The defendant Smith proposed to bet twenty-five dollars against the watch; but the prosecutor "had fears of them," as he says, and was not willing to bet. An offer was then made by Smith to bet forty dollars against the watch that there was a five cent coin in the folded paper. The prisoner, Defrese, at this time, says the prosecutor, "kept winking his eye at me." At this time Smith and the prisoner had alighted from the wagon and were standing by it. The prosecutor was sitting in the wagon. He states that he was afraid of the men,

Defrese v. State.

and unfastened his watch and handed it to the prisoner; but, to use his own words, "it was to be no bet until Smith put up forty dollars in Defrese's hands." The defendant Smith then took out a pocket-book, and, without showing any money, handed it to the prisoner. The defendant Smith then tore open the paper, exhibited a five cent coin which had been concealed in it, "snatches his own pocket-book and the watch from Defrese and walked off." The prosecutor besought him to come back; but he replied that he had shown the prosecutor the Yankee trick and walked on. The prisoner remained with the prosecutor a few minutes, then left him, saying that "he would go and get Smith to return the watch." It does not appear, however, that the prosecutor ever saw the prisoner again until he confronted him as his accuser. It was shown that soon after the departure of the defendants, two persons rode up to the wagon of the prosecutor, who seemed to them frightened and afraid of them. They assured him they were his friends, and he gave them a narrative of his troubles, and they at once went in pursuit of defendants. One of these persons states that he had seen the prisoner and Smith walking along the road before they came up with the prosecutor, and, on the same day, they had attempted the same trick upon the witness. The defendant Smith had "dropped the card" in the same way, and Defrese had picked it up and taken out the coin, and wanted the witness to bet Smith that there was no coin in it. He also stated that he saw the prisoner attempting the same thing some days before. Another witness stated that he saw these two defendants, on two different occasions, two weeks before, arranging some cards for a like operation. According to the witness, the process is simple. A card is split open to the center on one side, and a five cent coin inserted; the card is then folded up with another coin inclosed. The office of the confederates is to drop the card, as if casually, in the presence of the victim, and then to turn away, while the other picks it up, opens it, and takes out one of the coins, and then refolds it, all in full view of the victim. - On the approach of the other, he claims the package and at once offers to bet that there is a five cent coin in it. The victim, having seen the coin taken out, is easily entrapped. "'Tis a mere gambling trick," said the witness; "there is nothing like robbery or larceny about it, more than any other gambling trick."*

* It would seem strange, if in the multiform devices of evil-disposed persons to commit crime, and yet evade the law, some transaction, analogous to this, has never come

The law does not so regard it. On the contrary, the law would hold the secret theft an innocent sport, rather than an adroit artifice concocted to evade its penalties, and so well calculated to subserve the ends of felony and fraud, when attempted on the credulous and unwary.

It is denied at the bar that the transaction is larceny, either at common law or under statutory modifications of the common law doctrine.

It was a remark of Baron PARKE, that the definitions of larceny were none of them complete. 3 Greenl. Ev. 150. He objected to that of Mr. East, because he did not define the meaning of the word "felonious." It is the doctrine of the common law, that the essence of the offense is that the goods be taken against the will of the owner; *invito domino*. Foster, 123. And for more than three-score years the courts of this State have accepted as law the opinion of Judge HAYWOOD, in the case of *The State v. Long*, 1 Hay. 154, that, to constitute larceny, there must be a trespass in the taking. In that case, it appears that the judges were equally divided upon the question, whether borrowing with intent to steal will support a charge of larceny. And this query was left in that case to stand for an answer: "Is a trespass in the taking an essential ingredient in the offense?" 2 Batt. Dig. 842. Judge HAYWOOD, who was said by HENDERSON, C. J., to be the greatest criminal lawyer of his time, answered that inquiry in a note to the case of *The State v. Long*, and such has been held to be the law in this

before the courts for judgment. Every precedent, says Lord COKE, must have a beginning, but when authority and precedent are wanting there is need of great consideration before any thing of novelty is established. 2 Camp. Lives, Ld. Ch. 206.

But this kind of case is not altogether without precedent in the courts of this State. The case of *Enos v. State*, tried and determined at Jackson, in 1853, was not reported, but is well remembered. The facts of that case, as to the artifice used, were almost identical with those of this case, except that two pearl buttons were used instead of silver coins, and a small round box, of curious construction, called the Mexican ball, was used instead of a folded card. It requires two persons, apparently strangers to each other, and meeting casually, as in this case, to perform the operation. The prosecutor, a credulous countryman, fell an easy victim. One of the parties, while the other was looking away, touched a spring, opened the box, and took out a pearl button in full view of the prosecutor. The other, then advancing, offered to bet there was a button in the box. The prosecutor was induced to lend the party who had taken out the button a considerable sum to bet on it, and took out his pocket-book with that view, and proceeded to count out the money. At this instant, the other party showed the other button, seized the money and walked off with it, while his confederate remained for a few moments with the bewildered countryman, and consoled him by denouncing the outrage, and giving free utterance to his sympathy and indignation. Only one of the parties was arrested, and he was convicted of robbery, which, upon appeal to this court, was affirmed. SNEED, J.—REP.

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State ever since, except as it has been modified by statute. As Baron PARKER regretted that Mr. East did not define the word "felonious," so, perhaps, it may be matter of regret that Judge HAYWOOD did not define what course of conduct would constitute the kind of trespass which is an essential element in larceny, and whether or not it is to be restricted to the sense of the violation of another's possession in the common sense of those terms. The books abound in cases where the goods were parted with willingly, and there was really no trespass in the taking, in the sense in which that term is commonly used. And yet the law raises a constructive trespass in all such cases, as in the case cited by Greenleaf (3 Greenl. Ev. 160): "A felonious intent," says he, "may be proved by evidence that the goods were obtained from the owner by stratagem, artifice or fraud." And he calls attention to an important distinction to be observed between the crime of larceny and that of obtaining goods by false pretenses, and cites two cases in illustration, where the same fraudulent means were used by the prisoner to obtain possession of the goods in two separate cases. In the one case, the owner intended to part with his property absolutely, and to convey it to the prisoner; but, in the other, he intended only to part with the temporary possession for a limited and specific purpose, retaining the ownership in himself; the latter case alone would amount to larceny, the former constituting only the offense of obtaining goods by false pretenses. Thus, the same distinction is observed in all the old authorities. Where the possession alone, and not the right of property, is obtained by fraud or other illegal means, accompanied by the felonious intent, it is larceny. 2 East's P. C. 689; *Rex v. Charlewood*, 1 Leach, 409; 2 Russ. on Cr. 113, 127.

There are many other cases in which the owner parts willingly with the possession of his goods, in some manner of bailment; and a fraudulent conversion by the bailee is held to be larceny. The essence of the offense in that class of cases being the fraudulent purpose at the time of the bailment, the trespass is in the fraud and deception practiced upon the owner, by which the possession was acquired with felonious intent. The owner has parted with the possession of his goods, perhaps willingly, and hence no trespass, in its narrow and restricted sense, is committed. But when it is made apparent that some stratagem or artifice has been fraudulently used to acquire the possession; that the owner did not, in fact, part with his goods willingly, to be fraudulently appropriated by the bailee,

then the crime is complete. This is a wrong, a trespass, a violation of the possession. Thus it is said that the taking and carrying away are felonious where the goods are taken against the will of the owner, either in his absence or in a clandestine manner; or where possession is obtained either by force or surprise, or by any trick, device or fraudulent expedient, the owner not parting with his entire interest in his goods; and when the taker, in any such case, intends fraudulently to deprive the owner of his entire interest in the property against his will. Rosc. Cr. Ev. 586. Applying these principles to this case, we can see no escape for the prisoner, even upon the principles of the common law, independent of the peculiar statute of our State. In the language of Mr. Att. Gen. Heiskell, it is at last but a return to the ancient principles of the common law. The statute makes it larceny to use any bailment or agency merely as the means of procuring possession of property, with an intent at the time to make a fraudulent appropriation thereof. Code, 4679. We think all the elements of larceny under the law exists in this case. We have examined this case very carefully, indeed, hoping that there might be some door of escape for the prisoner, upon the law and the facts, as he is yet a young man, and, perhaps, capable of some industrial art, in which a life of honorable toil might have redeemed his good name. But thus we find the law, and thus it is our duty to declare it.

It is urged on behalf of the prisoner, that the court erred in admitting evidence that the prisoner and Smith were seen on several occasions attempting to practice upon others the same artifice practiced upon the prosecutor. We think the proof, in this kind of case, was legitimate and proper. The combination between the parties, as shown in the proof, may be classed as a conspiracy to cheat and defraud whoever may be cheated, or whoever they might find an easy victim to their artifice. And it is well settled that, in such cases, general evidence of a combination to defraud others in the same way may be shown to illustrate the *animus* and intention of the parties in the case in judgment. *Regina v. Frost*, 9 C. & P. 129; 2 Russ. on Cr. 699; 3 Greenl. Ev., §§ 90, 92. Every circumstance, however slight, that is calculated to throw light on the supposed crime is to be considered. *State v. Swink*, 2 Dev. & Bat. 9. As a general proposition of law, it is undoubtedly true that no distinct and substantive crime can be shown upon the trial, but this rule is better understood as it is given in the text-book, that the

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facts proven should be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge. 2 Russ. on Cr. 772. And then it has been held that, if it be material to show the intent with which the act charged was done, evidence may be given even of a distinct offense, not laid in the indictment. And a case of robbery is cited, in illustration, where the prisoner went with a mob to the house of the prosecutor, and of the mob, with a good intention, apparently, advised him to give them something to get rid of them and prevent mischief, upon which the prosecutor gave them the money laid in the indictment, it was held that for the purpose of showing that this was not *bona fide* advice, but, in reality, a mere mode of robbing the prosecutor, evidence was admissible of the demands of money made by the same mob at other houses, before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when any of the prisoners was present. *Rex v. Winkworth*, 4 C. & P. 444. And upon an indictment for robbing the prosecutor of his coat, the robbery having been committed by the prisoner, threatening to charge the prosecutor with crime, HOLROYD, J., received evidence of a second ineffectual attempt to obtain money the following day by similar threats; and upon a case reserved the judges were of opinion that the evidence was admissible to show that the prisoner was guilty of the former transaction. *Rex v. Edgerton*, Russ. & Ry. 375. The case of *Britt v. The State* was an indictment for obtaining money by false pretenses. The prisoner pretended that he had a warrant against the prosecutor for passing counterfeit money, and, by means of threats and promises in regard thereto, extorted bank notes from the prosecutor, in the county of Roane. On the next day, the prisoner again pursued the prosecutor into an adjoining county, and falsely pretended that the prosecutor had stolen his coat, and, by means thereof, extorted from the prosecutor certain articles of clothing. The indictment charged the prisoner with obtaining bank notes by falsely pretending that the prosecutor had passed counterfeit money. It was held that the transaction in the adjoining county, though a distinct offense, and on a different day, was admissible. 9 Hum. 31. It may be safely assumed that whatever tends to explain or elucidate the charge in question, or to demonstrate the guilty connection of the parties therein, may be given in evidence, though it may be a ground of another and distinct accusation. The intention to com-

mit the crime is the essence of the offense, and that which illustrates the intention is proper to be proven. We do not think that the court erred in admitting the testimony, but, on the contrary, we hold that in such a case as this, involving, as it does, the previous connection of the parties and the necessity of showing a fraudulent combination between them, it was eminently right and proper.

NOTE. — The case was reversed on another question. — **RE.**

ANDREWS, appellant, v. STATE.
STATE, appellant, v. O'TOOLE.
STATE, appellant, v. CUSTER.

(8 Heisk. 105.)

Constitutional law — right to "bear arms."

An act of the legislature provided "that it shall not be lawful for any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver." *Held* constitutional, with the exception of the prohibition as to the "revolver." (*See note, p. 22.*)

INDICTMENTS. The opinion sufficiently states the case.

Alvin Hawkins, for Andrews and O'Toole.

J. N. Thomason, for Custer.

J. B. Heiskell, attorney-general, for State.

FREEMAN, J. The questions presented for our decision in these cases involve an adjudication of the constitutionality of the act of the legislature of Tennessee, passed June 11, 1870, entitled "An act to preserve the peace and prevent homicide."

The first section provides "that it shall not be lawful for any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver. Any person guilty of a violation of this section shall be subject to presentment or indictment,

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and on conviction shall pay a fine of not less than ten nor more than fifty dollars, and be imprisoned at the discretion of the court, for a period of not less than thirty days, nor more than six months; and shall give bond in a sum not exceeding \$1,000, to keep the peace for the next six months after such conviction."

The second section imposes upon all the peace officers of the State the duty of seeing this act enforced. The third section makes certain exceptions in favor of officers and policemen, while *bona fide* engaged in their official duties in execution of process, or while searching for or engaged in arrest of criminals, and in favor of persons *bona fide* assisting officers of the law, and persons on a journey out of their county or State.

These are the leading provisions of this statute, and present the points of attack made upon it in argument at the bar.

It is first insisted that it is in violation of and repugnant to the second article of the amendments to the constitution of the United States, which is, that "a well-regulated militia being necessary to the security of a free State, the right of the people to *keep* and *bear* arms shall not be infringed.

On the other hand, it is maintained by the attorney-general that these amendments have no application to the States, and spend their force by limiting the powers of the federal government; and are, in their nature, simple restraints imposed by the States upon the government created by them, and therefore we cannot look to this article in order to test the validity of the acts in question. Upon the face of this article, it might have been plausibly insisted that it would have been operative upon, and control the action of the State, as well as of the federal government; and this position would apparently be strengthened by the other provision of the constitution of the United States (art. 6, § 2), that "this constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding. It will be seen, however, that it is the "constitution and laws made in pursuance thereof" that are the supreme law of the land, so that we are to turn to that instrument and ascertain what, by its fair construction and exposition, was intended to be allowed or prohibited, and to what powers its limitations and restrictions were applicable.

With this view, we examine the question in reference to the proper application of the article of the amendment under consideration.

The case of *Barron v. The Mayor and City Council of the City of Baltimore*. 7 Pet. 465 (Curtis' ed.), presented the question of the taking of private property, by the corporation of the city, as it was assumed for public use. It was insisted, in favor of the jurisdiction of the supreme court of the United States, to review the decision of the State court, that the case was within and arose under the provision of the constitutional amendments (art. 5), prohibiting the taking of private property for public use without just compensation. That this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State as well as that of the United States. The question was discussed with his usual ability by Chief Justice MARSHALL, and he lays down the proposition: "That the constitution was ordained and established by the people of the United States, for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States formed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of the power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes." The learned judge, after arguing the question at some length, says: "If in every inhibition intended to act on State power, in the original constitution, words are employed to express that intent, some strong reason must be shown for departing from this safe and judicious course in framing the amendments before that departure can be assumed." He then goes on to demonstrate that no such reason existed. He says: "Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards from the apprehended encroachments of their particular governments, the remedy was in their own hands, and would have been applied by themselves. A convention would have been called by the discontented State, and the required

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improvements would have been made by itself. Had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original constitution, and have expressed that intention."

The court, therefore, held that the provision of the fifth amendment, declaring that private property shall not be taken for public use without just compensation, was intended solely as a limitation on the power of the government of the United States, and was not applicable to legislation of the States. See, also, *Pervear v. Commonwealth*, 5 Wal. 479, 480, and numerous other cases decided by the supreme court of the United States, cited in note to case of *Barron v. City of Baltimore*, 7 Pet. 468 (Curtis' ed.).

We need cite no authority to sustain the proposition that, upon a question involving the construction of the constitution of the United States, or the just power of that government under said constitution, the decisions of the United States are binding on this court as well as all other courts of the States.

The State legislature is not, then, limited in its powers on this subject by this article of the constitution of the United States; it is a limitation, whatever be its construction and meaning, upon the powers of the other government, ordained and established by the people of the States themselves, or their conventions or legislatures.

We come now to the constitution of the State of Tennessee, and endeavor to see what restrictions or limitations the sovereign people of Tennessee have chosen to place upon themselves, in reference to this subject, for the general good.

First, it may be assumed as almost an axiom in our law, with reference to the legislatures, or law-making body of the States, that there is no limitation upon their powers, except such as are found either in the constitution of the United States, or of the State itself. Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception: *Cooley's Const. Lim.* 88, 89; *People v. Draper*, 15 N. Y. 543.

We do not, however, hold the power of the legislature to be supreme for all purposes, when not in terms prohibited by one or the other of these constitutions. We find limitations upon the powers of State legislatures, as clearly defined by fair construction and implication, and as binding as if expressed in so many words.

The division or separation of the powers of government in our

States, between the three departments, legislative, judicial and executive, involves restraint upon the action of the legislature, that it is imperative, and may be fairly arrived at with sufficient certainty by the application of the principle that it is the legislature that is the law-making power. The well-settled common-law definition of a law is, a rule of *action* prescribed by the law-making power. It must, then, of necessity (subject to possible exceptions), be an enactment operative in the future, in so far as it is to be a rule of action prescribed for the people of the State. No enactment of a legislature can, in the nature of things, reach back and control or give direction to an act already accomplished. It was complete from the moment of its birth, so to speak, and cannot be influenced or affected by another act, subsequent in time.

This view, however, is only incidentally mentioned as presenting a ground of limitation on the powers of State legislatures.

The constitution of Tennessee of 1834, article 1, section 24 of the Bill of Rights is: "That the sure and certain defense of a free people is a well-regulated militia; and as standing armies in time of peace are dangerous to freedom, they ought to be avoided, as far as the circumstances and safety of the community will admit; and that, in all cases, the military shall be kept in strict subordination to the civil authority." Section 25 exempts citizens, except such as are in the army of the United States, or militia in actual service, from punishment by martial law. Then follows section 26, which provides "that the free white men of this State have a right to *keep* and *bear* arms for their common defense."

Section 24 in the constitution of 1870 is the same as in the constitution of 1834.

Section 26 is: "That the *citizens* of this State have a *right* to *keep* and bear arms for *their* common defense. But the legislature shall have power by law to regulate the wearing of arms with a view to *prevent* crime."

What is the fair and legitimate meaning of this clause of the constitution, and what limitations does it impose on the power of the legislature to regulate this right? Is the question for our consideration?

What rights are guaranteed by the first clause of this article 26, "that the citizens have a right to keep and to bear arms for their common defense?" We may well look at any other clause of the same constitution, or of the constitution of the United States, that

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will serve to throw any light on the meaning of this clause. The first clause of section 24 says "that the sure defense of a free people is a well-regulated militia." We then turn to article 2 of amendments to the constitution of the United States, where we find the same principle laid down in this language: "A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be abridged." We find that, necessarily, the same rights, and for similar reasons, were being provided for and protected in both the federal and State constitutions; in the one, as we have shown, against infringement by the federal legislature, and in the other by the legislature of the State. What was the object held to be so desirable as to require that its attainment should be guaranteed by being inserted in the fundamental law of the land? It was the efficiency of the people as soldiers, when called into actual service for the security of the State, as one end; and in order to this they were to be allowed to *keep* arms. What, then, is involved in this right of keeping arms? It necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted; and as they are to be kept evidently with a view that the citizens making up the yeomanry of the land — the body of the militia — shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war; then the right to keep arms for this purpose involves the right to practice their use in order to attain to this efficiency. The right and use are guaranteed to the citizen, to be exercised and enjoyed in time of peace, in subordination to the general ends of civil society; but, as a right, to be maintained in all its fullness.

The right to keep arms necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose a man would have the right to carry them to and from his home, and no one could claim that the legislature had the right to punish him for it without violating this clause of the constitution.

But farther than this, it must be held that the right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace; that in such use, he shall not use them for violation

of the rights of others, or the paramount rights of the community of which he makes a part.

Again, in order to arrive at what is meant by this clause of the State constitution, we must look at the nature of the thing itself, the right to keep which is guaranteed. It is "arms;" that is, such weapons as are properly designated as such, as the term is understood in the popular language of the country, and such as are adapted to the ends indicated above; that is, the efficiency of the citizen as a soldier, when called on to make good "the defense of a free people;" and these arms he may use as a citizen, in all the usual modes to which they are adapted and common to the country.

What, then, is he protected in the right to keep and thus use? Not every thing that may be useful for offense or defense; but what may properly be included or understood under the title of arms, taken in connection with the fact that the citizen is to keep them, as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties as well as of the State. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold that the rifle of all descriptions, the shot-gun, the musket and repeater are such arms; and that under the constitution the right to *keep* such arms cannot be *infringed* or *forbidden* by the legislature. Their *use*, however, to be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good, so as not to infringe the right secured and the necessary incidents to the exercise of such right.

What limitations, then, may the legislature impose on the use of such arms, under the second clause of the 26th section, providing: "But the legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime?"

In the case of *Aymette v. The State*, 2 Humph. 159, Judge GREENB said that "the convention, in securing the public political right in question, did not intend to take away from the legislature all power of regulating the social relations of the citizen upon this subject. It is true, it is somewhat difficult to draw the precise line where legislation must cease and where the political right begins, but it is *not* difficult to state a case where the right of the legislature would

exist." This was said in reference to the clause of the constitution of 1834.

The convention of 1870, knowing that there had been differences of opinion on this question, have conferred on the legislature in this added clause the right to regulate the wearing of arms, with a view to prevent crime.

It is insisted by the attorney-general, as we understand his argument, that this clause confers power on the legislature to prohibit absolutely the wearing of all and every kind of arms, under all circumstances. To this we cannot give our assent. The power to regulate does not fairly mean the power to prohibit; on the contrary, to regulate necessarily involves the existence of the thing or act to be regulated. When applied to conduct or the doing of a thing it must, of necessity, mean some check upon, or direction given to that conduct or course of action, implying the act being performed but subject to certain limitations or restraints, either as to manner of doing it, or time or circumstances under which it is or may be done. Adopt the view of the attorney-general, and the legislature may, if it chooses, arbitrarily prohibit the carrying all manner of arms, and then there would be no act of the citizen to regulate.

But the power is given to regulate with a view to prevent crime. The enactment of the legislature on this subject must be guided by and restrained to this end, and bear some well-defined relation to the *prevention* of crime, or else it is unauthorized by this clause of the constitution.

It is insisted, however, by the attorney-general, that if we hold the legislature has no power to prohibit the wearing of arms absolutely, and hold that the right secured by the constitution is a private right and not a public political one, then the citizens may carry them at all times and under all circumstances. This does not follow by any means as we think.

While the private right to keep and use such weapons as we have indicated as arms is given as a private right, its exercise is limited by the duties and proprieties of social life, and such arms are to be used in the ordinary mode in which used in the country, and at the usual times and places. Such restrictions are implied upon their use as are thus indicated.

Therefore, a man may well be prohibited from carrying his arms to church, or other public assemblage, as the carrying them to such places is not an appropriate use of them, nor necessary in order to

his familiarity with them and his training and efficiency in their use. As to arms worn, or which are carried about the person, not being such arms as we have indicated as arms that may be kept and used, the wearing of such arms may be prohibited if the legislature deems proper, absolutely, at all times and under all circumstances.

It is insisted by the attorney-general that the right to keep and bear arms is a political, not a civil right. In this we think he fails to distinguish between the nature of the right to keep and its necessary incidents, and the right to bear arms for the common defense. Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights intended to be guaranteed; but the right to *keep* them, with all that is implied fairly as an incident to this right, is a private individual right guaranteed to the citizen not the soldier.

It is said by the attorney-general that the legislature may prohibit the use of arms common in warfare, but not the use of them in warfare; but the idea of the constitution is, the keeping and use of such arms as are useful either in warfare or in preparing the citizen for their use in warfare, by training him as a citizen to their use in times of peace. In reference to the second article of the amendments to the constitution of the United States, Mr. Story says (vol. 2, § 1897): "The importance of this article will scarcely be doubted by any persons who have duly reflected upon the subject. The militia is the natural defense of a free country against sudden foreign invasion, domestic insurrection and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up a large military establishment and standing armies in times of peace, both from the enormous expense with which they are attended, and the facile means which they afford to ambitious rulers to subvert the government or trample upon the rights of the people. The right of the citizen to keep and bear arms has justly been considered as the palladium of the liberties of the republic, since it offers a strong moral check against usurpation and arbitrary power of rulers; and will in general, even if these are successful in the first instance, enable the people to resist and triumph over them."

We cite this passage as throwing light upon what was intended to be guaranteed to the people of the States, against the power of the federal legislature, and at the same time as showing clearly what is the meaning of our own constitution on this subject, as it is evident the State constitution was intended to guard the same right and

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with the same ends in view. So that the meaning of the one will give us an understanding of the purpose of the other.

The passage from Story shows clearly that this right was intended, as we have maintained in this opinion, and was guaranteed to and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.

Mr. Story adds in this section: "Yet though this truth would seem to be so clear (the importance of a militia), it cannot be disguised that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How is it practicable," he asks, "to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt, and thus gradually undermine all the protection intended by this clause of our national bill of rights."

We may for a moment pause to reflect on the fact that what was once deemed a stable and essential bulwark of freedom, "a well-regulated militia," though the clause still remains in our constitutions, both State and federal, has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived.

As we understand the able opinion of Judge GREEN in the case of *Aymette v. State*, 2 Humph. 158, he holds the same general views on this question which are to be found in this opinion. He says: "As the object for which the right to keep and bear arms is secured is of a general nature, to be exercised by the people in a body for their common defense, so the arms — the right to keep which is secured — are such as are usually employed in civilized warfare, and constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority."

He says on page 159: "The legislature, therefore, have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizen, and which are *not* usual in civilized warfare, or would not contribute to the common defense." And we add that this right to keep arms, though one secured by the constitution, with such incidents as we have indicated in this opinion, yet it is no more above regulation for the general good than any other right. The right to hold property is secured by the constitution, and no man can

be deprived of his property "but by the judgment of his peers or the law of the land." If the citizen is possessed of a horse, under the constitution it is protected and his right guaranteed, but he could not, by virtue of this guaranteed title, claim that he had the right to take his horse into a church to the disturbance of the people; nor into a public assemblage in the streets of a town or city if the legislature choose to prohibit the latter and make it a high misdemeanor.

The principle on which all right to regulate the use in public of these articles of property is, that no man can so use his own as to violate the rights of others, or of the community of which he is a member.

So we may say with reference to such arms as we have held he may keep and use in the ordinary mode known to the country, no law can punish him for so doing while he uses such arms at home or on his own premises; he may do with his own as he will while doing no wrong to others. Yet, when he carries his property abroad—goes among the people in public assemblages where others are to be affected by his conduct, then he brings himself within the pale of public regulation, and must submit to such restrictions on the mode of using or carrying his property as the people, through their legislature, shall see fit to impose for the general good.

We may here refer to the cases of *Bliss v. Commonwealth*, 2 Litt. (Ky.) 90; *State v. Reid*, 1 Ala. 612, and case of *Nunn v. State of Georgia*, 1 Kelly (Ga.), 243, as containing much of interesting and able discussion of these questions; in the two last of which the general line of argument found in this opinion is maintained. The Kentucky opinion takes a different view, with which we cannot agree. We have not followed precisely either of these cases, but have laid down our own views on the questions presented, aided, however, greatly by the reasoning of these enlightened courts.

We hold, then, that the act of the legislature in question, so far as it prohibits the citizen "either publicly or privately to carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol," is constitutional. As to the pistol designated as a revolver, we hold this may or may not be such a weapon as is adapted to the usual equipment of the soldier, or the use of which may render him more efficient as such, and therefore hold this to be a matter to be settled by evidence as to what character of weapon is included in the designation "revolver." We know there is a pistol of that name which is not adapted to the equipment of the soldier, yet we also know that the pistol known as

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the repeater is a soldier's weapon — skill in the use of which will add to the efficiency of the soldier. If such is the character of the weapon here designated, then the prohibition of the statute is too broad to be allowed to stand consistently with the views herein expressed. It will be seen the statute forbids by its terms the carrying of the weapon publicly or privately, without regard to time or place or circumstances, and in effect is an absolute prohibition against keeping such a weapon, and not a regulation of the use of it. Under this statute, if a man should carry such a weapon about his own home, or on his own premises, or should take it from his home to a gunsmith to be repaired, or return with it, should take it from his room into the street to shoot a rabid dog that threatened his child, he would be subjected to the severe penalties of fine and imprisonment prescribed in the statute.

In a word, as we have said, the statute amounts to a prohibition to keep and use such weapon for any and all purposes. It therefore, in this respect, violates the constitutional right to keep arms, and the incidental right to use them in the ordinary mode of using such arms, and is inoperative.

If the legislature think proper, they may by a proper law regulate the carrying of this weapon publicly or abroad in such a manner as may be deemed most conducive to the public peace, and the protection and safety of the community from lawless violence. We only hold that as to this weapon the prohibition is too broad to be sustained.

The question as to whether a man can defend himself against an indictment for carrying arms forbidden to be carried by law, by showing that he carried them in self-defense, or in anticipation of an attack of a dangerous character upon his person, is one of some little difficulty. The real question in such case, however, is not the right of self-defense, as seems to be supposed (for that is conceded by our law to its fullest extent), but the right to use weapons, or select weapons for such defense, which the law forbids him to keep or carry about his person. If this plea could be allowed as to weapons thus forbidden, it would amount to a denial of the right of the legislature to prohibit the keeping of such weapons; for, if he may lawfully use them in self-defense, he may certainly provide them and keep them for such purpose; and thus the plea of right of self-defense will draw with it, necessarily, the right to keep and use every thing for such purpose, however pernicious to the gen-

eral interest or peace or quiet of the community. Admitting the right of self-defense in its broadest sense, still on sound principle every good citizen is bound to yield his preference as to the means to be used to the demands of the public good; and where certain weapons are forbidden to be kept or used by the law of the land in order to the prevention of crime — a great public end — no man can be permitted to disregard this general end and demand of the community the right, in order to gratify his whim or willful desire to use a particular weapon in his particular self-defense. The law allows ample means of self-defense without the use of the weapons which we have held may be rightfully proscribed by this statute. The object being to banish these weapons from the community by an absolute prohibition for the prevention of crime, no man's particular safety, if such case could exist, ought to be allowed to defeat this end. Mutual sacrifice of individual rights is the bond of all social organizations, and prompt and willing obedience to all laws passed for the general good is not only the duty, but the highest interest of every man in the land.

The principle we have laid down is sustained by a well-established rule of the law of nations in the conduct of war. While the general rule is that one belligerent may do his enemy all the injury he can, and for such purpose may lawfully kill him, yet the use of poisoned weapons is forbidden by the law of nations on the ground that higher ends are thereby subserved, and the rights of sovereign belligerent nations even should be made subordinate to these ends: Vattel, *Law of Nations*, top p. 361. So while the right of self-defense is one at all times to be maintained, yet, as to the means used to attain this end, they must be subordinated to the higher claims of the general good of the community.

We admit extreme cases may be put where the rule may work harshly, but this is the result of all general rules; that they may work harshly sometimes in individual cases. By our system, however, allowing the attorney-general to enter *nolle prosequi*, with the assent of the court, there is but little danger of the law being enforced in any such cases to the detriment of any one; and if such case should occur, an application to executive clemency may fairly be assumed as the remedy provided by the constitution to meet all such exigencies.

In the case of *The State v. Andrews*, one of the cases now under investigation, it is stated in bill of exceptions that a "plea of self

defense" was filed, demurred to, and demurrer overruled. We cannot notice the action of the court on this question, as the plea is not set out so that we can see its allegations and judge of their merits.

It was proposed, however, to prove "that there was a set of men in the neighborhood of defendant during the time he had carried his pistol and before, seeking the life of defendant." This testimony was objected to, and objection sustained by the court. We cannot see from this statement that the court erred, as the character of the weapon is nowhere shown; and it may have been such a weapon as we have held above to have been properly forbidden to be carried at all. If so, then it was no defense to the indictment.

The proof, however, showed that he had been in the habit of carrying a pistol since the war. In such a case he could not claim that he was really in peril of life or limb or great bodily harm so imminent as to present any element of self-defense in justification of his carrying his pistol.

The law of the land gave him ample protection, if he had chosen to seek its aid, by authorizing, on proper application, the arrest of the parties and sureties to keep the peace or confinement in prison to prevent the threatened injury. No court can assume that the law in such case would be powerless to give the needed protection. And we hold that it is not only the highest duty of all to submit to the law and seek its protection, thus doing reverence to its mandates, but that this involves no humiliation nor element of cowardice. On the contrary, it marks the highest moral courage to do right, notwithstanding passion and pride may urge us to the contrary course. He who subordinates his pride and his passions to the high behests of social duty has shown himself as possessing the highest attributes of a noble manhood, sacrifice of self and pride for the public good, in obedience to law.

In this view of the case, the question of what circumstances will justify a party in carrying arms such as the constitution permits him to keep in legitimate self-defense is hardly fairly before us. We may say that the clause of the constitution authorizing the legislature to regulate the wearing of arms with a view to prevent crime could scarcely be construed to authorize the legislature to prohibit such wearing where it was clearly shown they were worn *bona fide* to ward off or meet imminent and threatened danger to life or limb or great bodily harm, circumstances essential to make out a case of

self-defense. It might well be maintained they were not worn under such circumstances in order to crime, or that such purpose existed, or that the wearing under the circumstances indicated of a weapon that might lawfully be kept, had any direct tendency to produce crime. On the contrary, the purpose would be to prevent the commission of crime on the part of another.

If the party is protected in the keeping and use of such arms as we have indicated, only to be restrained by such regulations as may be enacted by the legislature with a view to prevent crime, it would seem that the use of such a weapon for defense of the person when in actual peril, the end being a lawful one, ought not, upon any sound principle, to subject a party to punishment. However, when the legislature shall enact a law regulating the wearing of weapons constitutionally allowed to be kept and used, as held in this opinion, the question may be presented fairly and can be decided.

There was a motion to quash the indictment in each one of these cases, which was overruled. The indictment in each case only charges that the parties carried a pistol, without specifying the character of the weapon, whether belt or pocket pistol or revolver. This was too indefinite a charge on such a statute, however literally it might be construed. There should be such specifications in the indictment as will enable the court to see that the weapon forbidden by the statute has been worn, and to inform the defendant of the character of weapon for the carrying of which he is to be held to answer.

For this error the cases will be reversed; the indictments quashed and remanded to the circuit courts to be further proceeded in.

NICHOLSON, C. J., and DEADRICK, J., concurred in the general views of the opinion. SNEED, J., dissented from so much of the opinion as questioned the right of the legislature to prohibit the wearing of arms of any description, or sought to limit the operation of the act of 1870.

NELSON, J., delivered a dissenting opinion.

Reversed.

NOTE. — In *Bites v. Commonwealth*, 2 Litt. (Ky.) 90, the statute "to prevent persons wearing concealed arms," was held unconstitutional, as infringing on the right of the people to wear arms in defense of themselves and the State. But in *State v. Jewel*, 15 La. An. 399, such a statute was held not to infringe the provisions of the United States

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constitution; but was a measure of police, prohibiting only a *particular mode* of carrying arms which is found dangerous to the peace of society. In *Stockdale v. The State*, 18 Ga. 225, it was decided that a statute prohibiting the open wearing of arms upon the person violates the provision of the constitution, though a statute against wearing concealed arms does not. So in Alabama it was held that a statute against carrying concealed weapons was not in violation of a guaranty in the State constitution, of the right to every citizen "to bear arms in defense of himself and of the State." *Owen v. State*, 31 Ala. 287, and see also *Cochrum v. State*, 24 Texas, 304. To the same effect is *State v. Buzzard*, 4 Ark. 18, *State v. Mitchell*, 3 Blackf. 229. — REP.

CASES
IN THE
SUPREME COURT
OF
OHIO.

WALKER, plaintiff in error, v. CITY OF CINCINNATI *et al.*

(21 Ohio St. 14.)

Tuition in aid of railroads. Constitutional Law — appointing power — what is an "officer."

An act of the legislature authorizing a city to raise by taxation of its citizens the means for constructing a railroad leading into such city, from points within or without the State, when the railroad is deemed by a majority of the citizens to be essential to the interests of the city, is not unconstitutional.

The legislature of Ohio authorized the judges of the superior court to appoint trustees of a contemplated railway. *Held*, (1) that this was not an exercise of the appointing power, forbidden to the legislature by article II, section 27 of the State constitution, such trustees not being *public officers* in the constitutional sense, and their appointment by the court being a legitimate function; (2) that the act was not in violation of article 4, section 14 of the State constitution, prohibiting the judges from holding any other office, such power of appointment being only an additional power or duty annexed to an existing office and not a new office; and (3) the act was not in violation of article II, section 20 of the State constitution, in not fixing the term of office and compensation of the trustees, such trustees not being "officers" in the sense of the constitution.

BILL for an injunction filed by J. Bryant Walker, April 12, 1870, in the superior court of Cincinnati. The opinion sufficiently states

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the facts. The defendants demurred, and the superior court at general term sustained the demurrer and dismissed the bill. Complainant appealed.

E. W. Kittredge, F. W. Moore, Charles Reemelin and Scribner & Hurd, for the injunction.

Stanley Matthews, Henry Stanberry, William B. Caldwell and E. A. Ferguson, against.

SCOTT, C. J. The question presented by this case is as to the constitutionality and validity of the act of the general assembly of this State, passed March 4, 1869, entitled "An act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants."

The general scope and purpose of the act is to authorize any such city to construct a line of railroad leading therefrom to any other terminus in the State or in any other State, through the agency of a board of trustees consisting of five persons, to be appointed by the superior court of such city, or if there be no superior court then by the court of common pleas of the county in which such city is situated. The enterprise cannot, however, be undertaken until a majority of the city council shall, by resolution, have declared such line of railway to be essential to the interests of the city, nor until it shall have received the sanction of a majority vote of the electors of the city, at a special election to be ordered by the city council, after twenty days' public notice.

For the accomplishment of this purpose, the board of trustees is authorized to borrow a sum not exceeding ten millions of dollars, and to issue bonds therefor in the name of the city, which shall be secured by a mortgage on the line of railway and its net income, and by the pledge of the faith of the city, and a tax to be annually levied by the council, sufficient with such net income to pay the interest and provide a sinking fund for the final redemption of the bonds.

In pursuance of the authority which this act purports to give, the city council of Cincinnati has resolved that it is essential to the interests of that city that a line of railway to be named "The Cincinnati Southern Railway," shall be provided between the said city of Cincinnati and the city of Chattanooga, in the State of Tennessee; and this action of the council has been indorsed and approved

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by a vote of more than ten to one of the electors of the city, at an election duly ordered and held pursuant to the requirements of the act. But fifteen hundred of the electors of the city voted against the proposed project, and the grave question here presented, on behalf of these unwilling electors and tax payers, is, whether it is within the power of the State legislature to authorize the taxation of their property by the municipality for the purpose of constructing such a line of railway by the means and in the manner prescribed in this act.

The consequences which may reasonably be expected to result from the exercise, by municipal corporations, of powers such as this act purports to confer, both in respect to public and private interests, are so momentous as to make it difficult to overestimate the importance of the question; and to demand at our hands the most careful investigation and deliberate consideration. This is the first instance in the history of the State, so far as we are aware, in which the general assembly has undertaken to authorize municipalities to embark in the business of constructing railroads on their own sole account, as local improvements. The railway contemplated in this instance is several hundred miles in length, extending into other States; the sum authorized to be expended in its construction is a large one, and should it prove inadequate for the completion of the road, we may reasonably expect it will be increased by subsequent legislation.

These considerations and the apparent abuse of discretion involved in declaring such a work to be so far *local* in its character as to justify its construction by a single city, at the sole expense of its citizens, all give a high degree of interest to the question. But we must bear in mind that the question is one of legislative *power*, and not of the wisdom, or even of the justice of the manner in which that power, if it exists, has been exercised. Had we jurisdiction to pass upon the latter question we should probably have no hesitation in declaring the act under review to be an abuse of the taxing power.

Let us then first inquire under what conditions it becomes competent for the judiciary to declare an attempted act of legislation, formally enacted by the general assembly, to be invalid, by reason of unconstitutionality.

Courts cannot, in our judgment, nullify an act of legislation on the vague ground that they think it opposed to a general "latent spirit," supposed to pervade or underlie the constitution, but which

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neither its terms nor its implications clearly disclose in any of its parts. To do so would be to arrogate the power of making the constitution what the court may think it ought to be, instead of simply declaring what it is. The exercise of such a power would make the court sovereign over both constitution and people, and convert the government into a judicial despotism. While we declare that legislative power can only be exercised within the limits prescribed by the constitution, we are equally bound to keep within the sphere allotted to us by the same instrument. On this subject we cannot do better than to adopt what is so well said by Judge COOLEY in his treatise on "Constitutional Limitations," pp. 128, 129, where, in speaking of limitations upon legislative authority, he says: "Some of these are prescribed by constitutions, but others spring from the very nature of free government. *The latter must depend for their enforcement upon legislative wisdom, discretion and conscience.* The legislature is to make laws for the public good and not for the benefit of individuals. It has control of the public moneys, and should provide for disbursing them for public purposes only. Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does properly constitute a public burden, *are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts*, except perhaps where its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, *the courts can enforce only those limitations which the constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives.*" And he adds on page 171: "Nor are the courts at liberty to declare an act void because, in their opinion, it is opposed to a *spirit* supposed to pervade the constitution, but not expressed in words;" citing *People v. Fisher*, 24 Wend. 220; *Cochran v. Van Surlay*, 20 id. 381; *People v. Gallagher*, 4 Mich. 244; *Benson v. Mayor of Albany*, 24 Barb. 252; *Grant v. Courter*, id. 232; *Wynehamer v. People*, 13 N. Y. 391.

We do not understand it to be claimed that the act in question is an assumption of any of the powers specially delegated to the general government by the constitution of the United States, nor that

it is an encroachment upon the functions and powers conferred by the State constitution on other departments of the government, and therefore impliedly withheld from the general assembly. The only questions, therefore, with which we have to deal, are: 1st. Whether the act is within the general grant of legislative power which the constitution declares to be vested in the general assembly; and, 2d. Does it contravene any of the limitations upon the exercise of legislative power, which are either expressed or clearly implied in any of the provisions of that instrument. And before we can answer the former question in the negative, or the latter in the affirmative, our convictions must be clear and free from doubt. *Lehman v. McBride*, 15 Ohio St. 573; *C.W. & Z. R. R. Co. v. Com. of Clinton Co.*, 1 id. 77, and authorities there cited.

Let us then consider, first, whether this act is within the general scope of legislative power, independent of special constitutional prohibition.

That it is within the legitimate scope of legislative power to authorize a municipality of the State to aid in the construction of a public improvement such as a railroad, by becoming a stockholder in a corporation created for that purpose, and to levy taxes to pay the subscription, must be regarded as fully settled in this State by repeated adjudication. In the case of *C.W. & Z. R. R. Co. v. Com. of Clinton County*, 1 Ohio St. 77, the subject was very fully considered; and it was held that, as the State may itself construct roads, canals, and other descriptions of internal improvement, so it may employ any lawful means and agencies for that purpose, among which are private companies incorporated for the construction of such improvements. And it was said that, for much stronger reasons, counties might be authorized to construct works of a similar kind, of a local character, having a special relation to their business and interests. And as the State might construct or authorize the counties to construct these works entire, or create corporations to do it entire, it was held that, as a question of power, each might be authorized to do a part.

The validity of subscriptions to the stock of railroad corporations made by counties, cities, towns and townships of the State, under special legislative authority, has been drawn in question in many cases which have since come before this court, and in none of them has the authority of the legislature to grant such power of subscription been doubted. *Steubenville & Indiana R. R. Co. v. Trus-*

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tees, 1 Ohio St. 105; *Loomis v. Spencer*, id. 153; *Cass v. Dillon*, 2 id. 607; *Thompson v. Kelley*, id. 647; *Ohio ex rel. Moran v. Commissioners of Clinton Co.*, 6 id. 280; *State ex rel. Garrell v. Van Horne*, 7 id. 327; *State ex rel. Smead v. Trustees of Union Township*, 8 id. 394; *Trustees of Paris Township v. Cherry*, id. 564; *Treadwell v. Commissioners*, 11 id. 183; S. C., 12 id. 596; *Goshen Township v. Shoemaker*, id. 624; *Commissioners of Knox Co. v. Nichols*, 14 id. 260; *Fosdick v. Village of Perrysburgh*, id. 472; *Shoemaker v. Goshen Township*, id. 569.

And the cases in which such legislative authority has been upheld by the courts of last resort in other States are too numerous even for reference. A list of more than fifty of such cases may be found in Judge COOLEY's treatise before referred to, p. 119, note 4.

If we even admit that all these decisions have been unwise, yet it is clearly too late to overrule them in this State. Were the question a new one, and properly determinable by the judgment of a court, we should perhaps concur in opinion with Judge REDFIELD, that subscriptions for railway stock by cities and towns do not come appropriately within the range of municipal powers and duties. Yet he is constrained to add that "the weight of authority is all in one direction, and it is now too late to bring the matter into serious debate." 2 Redf. on Railways, 398, 399, note. And if, in the absence of constitutional prohibition, a municipal corporation may be authorized to aid, by stock subscriptions, in the construction of a railway which has a special relation to its business and interests, upon what principle shall we deny that it can be authorized to construct it entirely at its own expense, when its relation is such as to render it essential to the business interests of the municipality? And upon the question of fact whether a particular road is thus essential to the interests of the city, this court in the case of the C. W. & Z. R. R., already referred to, quote approvingly from the case of *Goodin v. Crump*, 8 Leigh, 120, in which it was said: "If then the test of the corporate character of the act is the probable benefit of it to the community within the corporation, who is the proper judge whether a proposed measure is likely to conduce to the public interest of the city? Is it this court whose avocations little fit it for such inquiries? Or is it the mass of the people themselves — the majority of the corporation, acting (as they must do if they act at all) under the sanction of the legislative body? The latter assuredly." And in *Sharpless v. Mayor of Philadelphia*, 21 Penn. St. 147, it was

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said by C. J. BLACK: "If the legislature may create a debt and lay taxes on the whole people to pay such subscriptions, may they not with more justice and greater propriety, and with as clear a constitutional right, allow a particular portion of the people to tax themselves, to promote in a similar manner a public work in which they have a special interest? I think this question cannot be answered in the negative." * * * * I cannot conceive of a reason for doubting that what the State may do in aid of a work of general utility, may be done by a county or city, for a similar work, which is especially useful to such county or city, provided the State refuses to do it herself, and permits it to be done by the local authorities." The question in that case was upon the validity of subscriptions of stock made by the city of Philadelphia in aid of two railroads. One of these was the Hempfield road, which had its eastern terminus at Greensburg, three hundred and forty-six miles west of Philadelphia. Both subscriptions were sustained, and the court said: "It is the *interest* of the city which determines the right to tax her people. That interest does not necessarily depend on the mere location of the road." * * * * But it is not our business to determine what amount of interest Philadelphia has in either of these improvements. That has been settled by her own officers and by the legislature. For us it is enough to know that the city may have a public interest in them, and that there is not a palpable and clear absence of all possible interest perceptible by every mind at the first blush. All beyond that is a question of expediency, not of law, much less of constitutional law."

By the act under consideration, no railroads are authorized to be constructed, except such as have one of their termini in the city which constructs them. And that a city has no peculiar corporate interest in such channels of commerce as lead directly into it, is a proposition which, to say the least, is very far from being clearly true. And as the public or corporate interest in an improvement, rather than its particular location, determines the question as to the right of taxation for its construction, the fact that the road contemplated in the present case will lie mainly outside of this State, can make no difference. The right of eminent domain cannot be exercised, nor the road constructed in or through other States, without their permission and authority; and the act in question contemplates nothing of the kind. But, when such consent is given, we suppose the par-

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ticular direction given to the road can have no bearing on the question of corporate power to construct it.

It is also to be borne in mind, that this is not a case in which the legislature has determined a particular public improvement to be of a local character, and has imposed the burden of its construction on an unwilling municipality. But it is the case of an authority given to a city to exercise its powers of taxation only for the construction of an improvement which the local authorities have declared to be essential to the interest of the city, and even that cannot be done till a majority of its people have sanctioned the measure by their deliberate votes.

The towns and cities of the State are not the creations of the constitution. It recognizes these municipalities as existing organizations, properly invested by immemorial usage with powers of assessment and taxation for local purposes of a public character, but which were nevertheless subject to control and regulation by the State, and that these powers might be abused unless properly restricted. The constitution itself provides where the power of preventing such abuse shall be vested. It declares, in article 13, section 6, that "the general assembly shall provide for the organization of cities and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit so as to prevent the abuse of such power." It is very clear, that this constitutional mandate cannot be enforced according to judicial discretion and judgment. In the very nature of the case, the power which is to impose restrictions, so as to prevent abuse, must determine what is an abuse, and what restrictions are necessary and proper. As is said by the learned author, from whose treatise we have before quoted: "The moment a court ventures to substitute its own judgment for that of the legislature, in any case where the constitution has vested the legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference. The rule of law upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes

within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights." Cooley's Const. Lim. 167, 168.

We do not mean to say that every legislative enactment is necessarily valid unless it conflict with some express provision of the constitution. Undoubtedly, the general assembly cannot divest A of his title to property and give it to B. They cannot exercise judicial functions. They can impose taxes only for a public purpose. For it is of the essence of a tax that it be for a public use. Nor can they by way of taxation impose a burden upon a portion of the State only, for a purpose in which that portion of the State has no possible peculiar local interest. But to justify the interference of a court upon any of these grounds, the case must be brought clearly and beyond doubt within the category claimed; and such we are persuaded is not the case in respect to the act in question.

We have been referred to recent adjudications in several States, which are supposed to sustain the claim that taxation cannot be authorized for the construction of a railroad in cases like the present. In the case of *Whiting v. Sheboygan Railway Co.*, 25 Wis. 167, it was held that "a statute levying a tax for the sole purpose of making a direct gift of the money raised to a mere private railway in which the State or the tax payers have no ownership, is unconstitutional." The case from Michigan of *The People ex rel. The Detroit & Howell R. R. Co. v. Township of Salem*, 20 Mich. 452 (4 Am. Rep. 400), proceeds upon the same grounds. But, in the case now before us, the road is the property of the tax payers who furnished the means to build it. The recent decisions in Iowa are in conflict with the former uniform line of decisions on the subject in the same State, and in all the cases referred to in either of those States, the reasoning upon which the decisions rest is in conflict with what we cannot but regard as the settled law of this State.

We are brought to the conclusion that there is nothing in the general purport and main object of this act which places it outside of the sphere of legitimate legislative power.

We proceed to consider whether it is in conflict with any of the express limitations imposed by the constitution.

It is claimed that the general assembly, in the act in question, by

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authorizing the judges of the superior court to appoint trustees of the contemplated railway, have exercised an appointing power which is forbidden by the twenty-seventh section of the second article of the constitution. The argument is, that the trustees whom the act authorizes the court to appoint are *public officers*; that their appointment is not the exercise of a judicial function, or of any power that can be conferred on the judges of the court *as such*; and that the conferring of this power of appointment is the creation of a new and independent office, which cannot be filled by the appointment of the legislature, whether the appointee be designated by name or by reference to another office which he holds. In the same connection it is claimed that this power of appointment is conferred on the judges of the superior court in violation of article four, section fourteen of the constitution, which prohibits the judges of the supreme court and the court of common pleas from holding any other office of profit or trust under the authority of this State or the United States. And it is further argued that the act is in conflict with article 2, section 20 of the constitution, because it does not fix the term of office and compensation of the trustees. Are any of these positions clearly well taken?

We shall first inquire whether the power of appointment conferred by this act on the judges of the superior court involves the exercise of an appointing power by the general assembly. Were the judges thereby appointed to a public office? In support of the affirmative of this question we are referred to the decision of this court in the case of *The State on relation of the Attorney-general v. Kennon et al.*, 7 Ohio St. 546. In that case it was held that the selection and designation by name of the defendants, by the general assembly, to exercise continuously and as a part of the regular and permanent administration of the government, important public powers, trusts and duties is an appointment to office. But we think the present case cannot be brought within the principle of that decision. In this case there is no designation of individuals by name to exercise any public functions whatever. It is clearly the case of an additional power or duty annexed to existing offices, and not the creation of a new office. Upon the filing of a petition by the city solicitor in the superior court, praying for the appointment of trustees, it is made the duty of the judges of that court to make such appointment, and to enter the same on the minutes of their court. The power of appointment and of subsequent removal for unfaithfulness can be

exercised only by the *court as such*; and all power of control in the premises on the part of the judges ceases with the termination of their judicial offices. It is true that the act confers a new power on the judges of the superior court, but, as was said by Judge SWAN in his concurring opinion in the case referred to, "if adding to the duties or powers of existing offices is an excuse of the appointing power, then every new duty required or power conferred upon any State, county or township officer must be deemed the exercise by the general assembly of the appointing power, and forbidden by the constitution."

But it is said that the appointment of these trustees is not the exercise of a judicial function. Suppose this to be so. Does it follow that no functions except such as are purely judicial can be constitutionally annexed to the office of a judge? Can judges not be made conservators of the peace, and, as such, be required to discharge duties which are not of a judicial character? If no power of appointment to any office or position of public trust can be devolved upon a court or judge, it is certain that many of the statutes of this State are invalid. Quite a number of statutes have been referred to by counsel, in which such power of appointment is given to probate judges, judges of the court of common pleas, and judges of the superior court.

But is it clear that the selection and appointment of these trustees, which the act requires to be made by the judges of the superior court, and to be entered on the minutes of the court, is in no sense a judicial act? It is the act of a court, and the selection of the trustees and the fixing of the amount of their bonds require the exercise of judgment and discretion. Authorities are not wanting to show that such an act is properly judicial in its character. Thus, where a statute of New York authorized a town to issue bonds to aid in the construction of a railroad, and made it the duty of the county judge to appoint, under his hand and seal, three commissioners to carry into effect the purposes of the act, it was held by the supreme court of that State that the act of making such appointment was judicial. It was said by the court: "The action sought from the county judge is judicial. It is conferred by the statute upon the office of county judge, to be exercised under its seal. The duty requires the exercise of judgment and discretion in the selection of commissioners. The individual is in no way responsible for any acts of those he may select in the discharge of

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their duties. In no sense is the act of selecting commissioners ministerial. They do not act on the command of the county judge; he issues no process to them. If, after appointment, the persons designated accept and act, they do so under and by virtue of the statute, and not in virtue of the order designating them as commissioners." *Sweet v. Hulbert*, 51 Barb. 315.

Nor do we think that these trustees are *officers* within the meaning of that clause of the constitution which provides that "the general assembly, in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers." This clause cannot be regarded as comprehending more than such offices as may be created to aid in the permanent administration of the government. It cannot include all the agencies which the general assembly may authorize municipal and other corporations to employ for local and temporary purposes. These trustees have no connection with the government of the State, or of any of its subdivisions. They have nothing to do with the general protection and security of persons or property. Their sole duty is to procure and superintend the construction of a particular road, and to lease it when constructed. When this shall have been done, so far as appears from the act, their functions end; and in the road, when constructed, the State will have no proprietary interest. All the railroads of the State, though owned and operated by private corporations are, in an important sense, public improvements; yet the officers who manage them, and superintend their pecuniary interests, are not public officers within the meaning of this constitutional provision. No one supposes that the compensation of such officers must be fixed by the legislature.

It remains to consider, with reference to the general purpose and object of the act, whether there are in the constitution special limitations on the the general legislative power vested in the general assembly, which prohibit the authorizing of a city to raise, by taxation of its citizens, the means for constructing a railroad leading into such city, when such an improvement is deemed by a majority of the citizens to be essential to its interests. It is claimed that the grant of such authority is in violation of article 8, section 6, of the constitution, which reads as follows: "The general assembly shall never authorize any county, city, town or township by vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation or association whatever; or to raise money

for, or loan its credit to, or in aid of, any such company, corporation or association."

It is proper to consider this section in connection with the sections which precede it in the same article, and with some provisions found in other articles which bear more or less directly upon the same and kindred subjects.

The first two sections of this article enumerate the purposes for which the State may contract debts, and the third section declares that, except the debts thus specified, "no debt whatever shall hereafter be created by or on behalf of the State." The fourth section declares that: "The credit of the State shall not, in any manner, be given or loaned to, or in aid of, any individual, association or corporation whatever; nor shall the State ever hereafter become a joint owner or stockholder in any company or association, in this State or elsewhere, formed for any purpose whatever." The fifth section forbids the assumption by the State of the debts of any county, city, town or township, or of any corporation whatever, unless such debts shall have been created to repel invasion, suppress insurrection, or defend the State in war. In article 12, section 6, it is declared: "The State shall never contract any debt for purposes of internal improvement." And article 13, section 6, provides as follows: "The general assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their powers of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

In *Cass v. Dillon*, 2 Ohio St. 613, 614, it was held, and we think properly, that the limitations imposed upon the State by the first three sections of article 8 were not intended as limitations upon her political subdivisions, her counties and townships. And the clear implications of the fifth section are, that counties, cities, towns and townships may create debts to repel invasion, suppress insurrection, or defend the State in war, which the State may assume; and may also create debts for other purposes which the State is forbidden to assume. By the fourth section a limitation is imposed in respect to the State, similar to that prescribed in the sixth section, in regard to counties, cities, towns and townships. The State and her municipalities and subdivisions are clearly distinguished and treated separately. It is to the latter that the inhibitions of the sixth section relate. What are the extent and purport of those inhibitions? Its own language must furnish the answer to this

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question, if that language be plain and unambiguous. Of course, I do not mean that we are bound to adhere strictly to the letter, without regard to the evident meaning and spirit of the instrument. The fundamental law of the State is to be construed in no such narrow and illiberal spirit. On the contrary, it is to be construed according to its intention, where that is clear; and that which clearly falls within the reason of the prohibition may be regarded as embodied in it. Still, it is very clear that we have no power to amend the constitution, under the color of construction, by interpolating provisions not suggested by the language of any part of it. We cannot supply all omissions which we may believe have arisen from inadvertence on the part of the constitutional convention. Recurring then to the language of this section, it is quite evident that it was not intended to prohibit the construction of railroads; nor, indeed, to prohibit any species of public improvements.

The section contains no direct reference to railroads, nor to any other special classes of improvements or enterprises. Its inhibitions are directed only against a particular manner or means by which, under the constitution of 1802, many public improvements had been accomplished. And its language is sufficiently comprehensive to embrace every enterprise involving the expenditure of money and the creation of pecuniary liabilities. Under the constitution of 1802, numerous special acts of legislation had authorized counties, cities, towns and townships to become stockholders in private corporations, organized for the construction of railroads to be owned and operated by such corporations. The stock thus subscribed by the local authorities was generally authorized to be paid for by the issue of bonds, which were to be paid by taxes assessed upon the property of their constituent bodies. Many of these enterprises proved unprofitable, and the stock became valueless. Some of them wholly failed. Heavy taxation followed to meet and discharge the interest and principal of the bonds thus issued. Towns and townships were induced to attempt repudiation of their contracts. And, as the records of this court abundantly show, the assessment and collection of the taxes which the preservation of good faith required, had repeatedly to be enforced by mandamus. In many, if not all of these cases, it was alleged that the stock subscriptions sought to be enforced had been voted for and made under the influence of false and fraudulent representations made by interested officers and agents of the corporation to be aided by the subscription. At the time of the formation and adoption of

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the present constitution these evils had begun to be seriously felt, and excited the gravest apprehensions of calamitous results. Under such circumstances, this section was made a part of the State constitution. It may be well again to recur to its language: "The general assembly shall never authorize any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation or association whatever: or raise money for, or loan its credit to, or in aid of any such company, corporation or association." The mischief which this section interdicts is a business partnership between a municipality or subdivision of the State and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders nor furnish money or credit for the benefit of the parties interested therein. Though joint-stock companies, corporations and associations only are named, we do not doubt that the reason of the prohibition would render it applicable to the case of a single individual. The evil would be the same, whether the public suffered from the cupidity of a single person, or from that of several persons associated together.

As this alliance between public and private interests is clearly prohibited in respect to all enterprises of whatever kind, if we hold that these municipal bodies cannot do on their own account what they are forbidden to do on the joint account of themselves and private partners, it follows that they are powerless to make any improvement, however necessary, with their own means and on their own sole account. We may be very sure that a purpose so unreasonable was never entertained by the framers of the constitution.

Besides, if this section is to be construed so as to prohibit municipal corporations from making improvements on their own account, and with their own means, then the fourth section of this same article, which is quite similar in language, must be held to prohibit the making of any improvements by the State on her own account and with her own means. This would not only be highly unreasonable but would conflict with the clear implications of the section which prohibits the State from *contracting any debt for purposes o.*

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internal improvement. This implies that the State may make all such improvements as will not involve the creation of a debt.

We find ourselves unable, therefore, upon any established rules of construction, to find in this section the inhibition claimed by counsel to arise by implication. It may be, and indeed I think it very probable, that had the framers of the constitution contemplated the possibility of a grant to a municipal corporation of such powers as the acts under consideration confer, they would have interposed farther limitations upon legislative discretion. But omissions of such a grave character surely cannot be supplied according to the conjectures of a court.

It is argued, however, that the trustees of the contemplated railway are a corporation, and that the act in question violates the terms of this section, by authorizing the city to raise money for and loan its credit to this corporation, to enable it to construct a railroad. We think it unnecessary to inquire whether the trustees provided for by the act are in any sense a corporation or not. For if they are an association or organization of any kind whatever, having a property interest in the road distinct from that of the city, then the objection is well taken. The inhibitions of this section are not directed against *names*. But it is clear that the trustees are a mere agency, through which the city is authorized to operate for its own sole benefit. Neither as individuals nor as a board have they any beneficial interest in the fund which they are to manage, or in the road which they are to build. They are *in fact*, as well as *in name*, but *trustees*, and the sole *beneficiary* of the trust is the city of Cincinnati. They are authorized to act only in the name and on behalf of the city. Looking, therefore, to the substance of things, this case cannot be brought within the terms of the prohibition, unless we are to regard the city itself as being one of the corporations for which money is not to be raised nor a loan of credit made.

We do not understand counsel as relying upon any other ground of objection to the validity of this act than those which we have considered, and are of opinion that the judgment of the court below must be affirmed.

Judgment affirmed.

DYE, plaintiff in error, v. DYE.

(21 Ohio St. 88.)

Surety — liability on promissory note.

The mere omission by the holder of a promissory note to present it to the assignee (for benefit of creditors) of the principal will not discharge the surety.

ACTION on a promissory note, brought by W. H. H. Dye against Thomas C. Dye and Riswell S. Dye, joint and several makers, and James M. Dye, surety. The defense of James M. Dye was that one of the principal makers had made an assignment for the benefit of creditors, and that the holder of the note had neglected to present it to the assignees, whereby he (the surety) claimed to be discharged. This point was overruled, and judgment for plaintiff was rendered. James M. Dye asked leave to file his petition in error.

R. S. Hart, for motion.

H. G. Sellers and *G. D. Burgess*, against.

DAY, J. The error alleged originated in the court of common pleas. The action in that court was on a promissory note. One of the defendants, who was surety on the note, interposed a defense which raises the material question to be considered: Will the mere neglect of the holder of a note to present it to the assignee of the principal discharge the surety to the extent that might have been thereby realized on it out of the assets of the principal.

No case upon this precise point has been brought to our attention; we are, therefore, left to determine it upon the principles that run through the cases on analogous questions.

The case before us is not embarrassed by considerations that arise in cases where the principal debtor is discharged by the negligence of the creditor, for the statute of this State in relation to assignments leaves the liability of the principal makers of the note unaffected by the neglect to present it for allowance and payment out of the assets in the hands of the assignees.

A creditor may, however, in many ways do that which, though it

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may not affect the liability of the principal, will exonerate sureties. In all such cases, the discharge of the surety is based on some recognized and well-defined principle, and, in general, results from a positive act of the creditor which operates to the prejudice of the surety. Passiveness on the part of the creditor will not discharge the surety, unless he omits to do, when required by the surety, what the law or his duty enjoins him to do, or unless he neglects, to the injury of the surety, to discharge his duty in any matter in which he occupies the position of a trustee for the surety. *The Farmers' Bank of Canton v. Reynolds*, 13 Ohio, 84; *Schrappell v. Shaw*, 3 Comst. 446; 1 Story's Eq., § 325; and note to *Rees v. Barrington*, 3 Lead. Cas. Eq. 529, for a full reference to the authorities on the subject.

The discharge of the surety is not claimed in this case, by reason of any positive act of the creditor, nor by reason of his neglect to prosecute the claim, after being required by the surety to do so by notice in writing, in accordance with the statute, nor, indeed, by reason of his neglect to comply with any requirement of the surety whatever, for, from aught that appears, the passiveness of the surety equaled that of the creditor. Nor did the creditor have any thing in his hands, actually or constructively, in the nature of a trust. Then, upon the principles already so broadly stated, it would seem that the surety was not exonerated from liability on the note.

But it is claimed that it was the duty of the creditor to present the note to the assignees, and thus save the surety harmless from the debt, and that his neglect to do so was, consequently, a fraud on the surety. This claim of fraud, it will be seen, rests on the supposition that it was a duty the creditor owed to the surety, to present the note to the assignees in order to protect him from liability. What might have been his duty, if the surety had required him to present the note, we are not called upon to decide. But so long as the surety is willing to remain passive, why may not the creditor? He may be entirely willing to continue to rest upon the credit he had originally given to the surety, rather than take upon himself the trouble and expense of claiming a dividend out of the assets of the principal; for he may look to the surety as well as the principal for the payment of the debt. He gave credit to both equally, while the surety trusted to the principal alone for his indemnity. So far as the interest of the creditor was concerned, it was a matter of indifference to him which of the makers of the note paid it, but

it was directly for the interest of the surety that the note should be paid out of the assets of the principal. It would, therefore, seem most reasonable that he should be the primary party to move for the accomplishment of that object, for he who enjoys the benefit ought to sustain the burden. At least he might have requested the creditor to present the note to the assignees, and, if he refused to do so, I see no reason why he might not have done it himself, nor why, if the assignees had refused to allow it, he might not have enforced it by action, for the statute gives to the surety substantially every remedy that the creditor has, to enforce payment of a claim by the principal. The note became due within the time mentioned in the statute for the presentation of claims, and was overdue more than two months before the assignees were authorized by law to make a dividend, and more than two years before their final settlement. The surety was not at any time debarred from any of his legal remedies against the principal, or his assets in the hands of the assignees; and if, by possibility, they were not as ample as those of the creditor, he might at least have made them equally so, by discharging his own obligation to the creditor by payment of the note when it became due. At best, then, the surety was not less in default than the creditor, and, therefore, can claim no equitable right against him. Indeed, if the surety had discharged his duty, by payment of the note when it became due, the creditor would have had no claim to present to the assignees of the principal; the surety's own default to the creditor, therefore, in fact becomes the ground of his claim against him. Since, then, the breach of duty charged against the creditor cannot be sustained without giving the surety the advantage of his own default, I know of no principle on which his claim can be tolerated.

The case of *McCollum v. Williams' Exr's*, 9 Vt. 143, is much relied on by the plaintiff in error. In that case, the note was barred as against the estate of the principal, by reason of the creditor's failure to present it to the administrator within the time limited by law, and the creditor sought to charge the estate in equity through its liability to the surety on the note. Relief was refused, in part, on the ground that good faith required the creditor to present his note to the administrator, and that, therefore, the negligence of the creditor, which discharged the principal, also discharged the surety. But that case is distinguishable from this, in that, here the principal was not discharged, nor does it appear, as it

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did in that case, that the surety was out of the country, and had no notice of the decease of the principal.

But so far as the ruling in that case has any application to this, the weight of authority is against it. In *Johnson v. The Planters' Bank*, 4 Smedes & Marsh. 165, it was held that the surety on a note was not discharged, although it was barred as against the estate of the principal, by reason of the omission of the holder of the note to present it to the administrator within the time limited. In that case, after stating the general rule, "that the obligation of the surety becomes extinct by the extinction of the obligation of the principal debtor," the court say: "An exception to this rule takes place whenever the extinction of the obligation of the principal arises from causes which originate in the law, and not in the voluntary act of the creditor, as in bankruptcy. Theobald on Principal and Surety, 67; *Brown v. Carr*, 7 Bing. 508. The creditor, in order to preserve his rights against the surety, is not bound to active diligence, and, if he merely remains passive, his rights are not impaired." Theobald, 80. * * * * * "The creditor would not often give the credit without security; he takes it for his own indemnity. The surety knows his own risk. If he desires to lessen that risk, he may file a bill to compel the bringing of the suit, or, by payment, he may have an assignment of the instrument. But, while both remain passive, the operation of the law will not discharge surety." * * * * * "The sureties may, in such cases, compel the presentment of the claim in due time, and thus preserve their recourse against the estate beyond doubt. If they fail to do so, they are in fault in neglecting to protect their interest, and have no right to throw the consequences of their negligence upon the creditor."

To the same effect is the holding in *Nashville Bank v. Campbell*, 7 Yerg. 353; *Hooks & Wright v. Branch Bank of Mobile*, 3 Ala. 580; *Vredenburg v. Snyder*, 6 Iowa, 39; and *Silbey v. McAllaster*, 8 N. H. 389.

In the last case cited, the chief justice, in delivering the opinion of the court, said: "It is well settled that a discharge of the principal, under a bankrupt law, does not discharge the surety." *Flagg v. Tyler*, 6 Mass. 33; *Welsh v. Welsh*, 4 M. & S. 334; *Martin v. Brecknell*, 2 id. 39; 4 J. B. Moore, 153.

"And a creditor is under no obligation to prove his debt under a commission of bankruptcy of the principal, unless the surety gives

to the creditor an indemnity for the expense." *Hayes v. Ward*, 4 Johns. Ch. 132; *Ex parte Rushforth*, 10 Ves. 414; 6 id. 734; *King v. Baldwin*, 2 Johns. Ch. 562.

"The surety is the person who trusts the principal, and it is his business to see that the principal pays. * * * * * Such being the general rules of law, it is very apparent that if the principal die, and his estate be administered in the insolvent course, the creditor is under no obligation to present his claim to the commissioners, and procure what he may from that estate. He has a right in such case to look to the surety for the whole amount."

"It is the business of the surety to procure the creditor to lay his claim before the commissioners, or to pay the claim, and then lay his own claim before the commissioners for the money he may have paid to the creditor."

If then the mere omission of the creditor to present his claim to the assignee of the principal in bankruptcy, or to his administrator, where in either case the liability of the principal is discharged, will not exonerate the surety, much less will such neglect exonerate him in a case like the one before us, where the principal remains liable.

The doctrine of the cases referred to is in harmony with that before stated in relation to the liabilities of sureties, and, on principle, would seem to be decisive of this case.

In *McLemore v. Powell*, 12 Wheat. 555, Judge STORY says: "It was correctly said by Lord ELDON, in *English v. Darley*, 2 B. & P. 61, that 'as long as the holder is passive all his remedies remain;' and, we may add, that he is not bound to active diligence."

This doctrine, as applied to sureties, has been carried in the State to the extent of holding that the loss of a judgment lien on the property of the principal, by reason of the omission of the creditor to enforce it, will not release the surety. *Farmers' Bank of Canton v. Reynolds*, 12 Ohio, 84.

We are not required to go to that extent, to hold that the mere omission of a holder of a note to present it to the assignee of the principal will not exonerate the surety from liability thereon.

We are not so well convinced that the rulings of the courts below were correct, that we are constrained to overrule the motion for leave to file a petition in error.

Motion denied.

MORRIS, plaintiff in error, v. FAUROT.

(21 Ohio St. 155.)

Promissory note — parol evidence as to indorsement.

In an action on a promissory note, brought by the indorsee against the indorsers, the defense was that plaintiff, for C. & E., the makers of the note, paid the amount of it to defendants, the holders, and that after such payment, and after the note had been delivered to plaintiff for C. & E., defendants, at plaintiff's request, indorsed it, with the express understanding that the indorsement was to be used by plaintiff only as evidence to C. & E. that he had paid the note. *Held*, that parol proof of this defense was admissible.

ACTION on a promissory note. The opinion states the case.

James Murray and Irvine & Brice, for plaintiff in error.

Cunningham & Brotherton, for defendant in error.

MCLIVAIN, J. Leave is asked to file a petition in error to reverse the judgment of the district court of Allen county, affirming the judgment of the court of common pleas, rendered against the plaintiff in error in an action wherein the plaintiff in error was plaintiff and the defendants in error were defendants.

The action in the common pleas was brought by the plaintiff as indorsee against the defendants as indorsers of a promissory note made by Crochan & McElroy, John P. Scott and C. Young, for \$361.25, payable sixty days after date to the defendants, by their firm name of "National Deposit Bank (Shelby Taylor, B. C. Faurot & G. G. Hackedorn)," and dated March 24, 1870.

The indorsement upon which suit was brought was as follows: "G. G. Hackedorn, Ch."

It is alleged in the petition that said note became due on the 23d of May, 1870; was indorsed to plaintiff on the 15th day of June, 1870; that on the 18th day of August he presented the same to the makers for payment, which was refused, of which defendants had due notice; and afterward he presented the same to defendants and demanded payment, and the defendants refused to pay the same or any part thereof, etc.

The defendants answered the petition, 1st. By denying that they indorsed and delivered said note to the plaintiff. 2d. By averring that on the 15th day of June, 1870, the plaintiff, for Cochran & McElroy, the principals in said note, paid off and discharged the same to the entire satisfaction of the defendants, who were then the owners and holders thereof, and that after such payment, and after the note had been delivered to the plaintiff for Cochran & McElroy, the defendant Hackedorn, cashier of the defendants, at the request of the plaintiff, wrote the name "G. G. Hackedorn, Ch.," across the back of the note, with the express understanding and agreement that this indorsement was to be used by the plaintiff only as evidence to Cochran & McElroy that he had paid off their indebtedness on the note to the defendants, and that it was made for no other purpose whatever.

The plaintiff, by reply, denied allegations of new matter contained in the answer.

The issues thus made were submitted to a jury, and verdict and judgment were rendered against the plaintiff.

By bill of exceptions all the testimony and divers exceptions to the rulings of the court were placed upon the record.

The objections urged against the judgment may be reduced to the following:

1. Error in admitting improper testimony.
2. Error in refusing to rule out certain testimony.
3. Error in improperly admitting testimony by the defendants after the plaintiff had closed his case in rebuttal.
4. Error in overruling a motion to set the verdict aside because it was against the weight of evidence.

1. Did the court err in admitting improper testimony.

It is claimed that error was committed in admitting parol testimony to contradict the terms of a written agreement. The testimony objected to consisted of the statements of witnesses as to the acts and conversations of the parties at the time of the indorsement and delivery of the note to plaintiff, and of his admission before and after that time, tending to show that he had been employed by the makers of the note to pay the same for them, and that he did pay and discharge it accordingly, and tending to show that the indorsement was made after payment at the request of plaintiff, to be used by him only as evidence that he had paid the note.

That parol testimony is inadmissible to contradict or vary the

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terms of written instruments, and that the contract of an indorser of a promissory note, whether the indorsement be in blank or otherwise, is within the meaning of that rule as general propositions of law are true, may be admitted for the purposes of this case. But the question in the case, as we understand it, was not as to the terms of the contract, or the nature or extent of the indorser's liability, but whether there was any contract at all out of which any liability could arise.

A blank indorsement, which evidences a contract, the terms of which cannot be contracted or varied by parol testimony, is one made in the usual course of business, for the purpose of transferring the title of or giving credit to the paper. The defense in this case was, that no transfer of title was intended, nor was credit intended to be given this note by the transaction, but that it was paid and discharged by the makers through and by the plaintiff, who was acting for them and at their request.

The object and tendency of the testimony objected to were to prove this defense — to show that the note itself, as well as the indorsement thereon at the time of delivery to the plaintiff were nullities, and not evidences of subsisting obligations. We can see no reason why such proof, upon such an issue between the parties to the transaction, should not be allowed.

It was also competent to give in evidence the letter from the makers of the note to the defendants upon the subject of the arrangement made between them (the makers) and the plaintiff for the payment of the note, testimony having been first offered tending to show that the contents of the letter were read to the plaintiff at the time of the alleged payment.

[The remainder of the opinion is immaterial.]

Motion overruled.

WALLACE AND PARK, plaintiffs in error, v. JEWELL.

(21 Ohio St. 168.)

Promissory note — when joint — effect of adding a name as maker.

A promissory note in the form "I promise," etc., and signed by several parties as makers, is joint as well as several.

Adding the name of a person as maker of a joint and several promissory note after delivery, without the knowledge or consent of the original signers, is a material alteration, and vitiates the note as to such original signers.

ACTION on a promissory note. The note was as follows:

"\$2,000.

"YOUNGSTOWN, Dec. 4, 1863.

"Five months after date, I promise to pay to the order of A. M. Jewell two thousand dollars at my mill in this place, with inta. at seven per cent per annum, value received.

"ALMON RANTY.

"RANTY BROS."

Indorsed "HIRAM PARK.

"SAMUEL WALLACE."

The opinion sufficiently states the case.

The verdict and judgment were for plaintiff.

Defendants filed their petition in error.

Thomas W. Sanderson, for plaintiffs in error.

Hutchins & Glidden and *B. F. Hoffman*, for defendant in error

WHITE, J. This case is before us on error to the charge of the court as to the effect of the alleged alteration of the note, or the liability of the plaintiffs in error, who were the defendants below. The alteration consisted in adding, by the procurement or with the consent of the plaintiff, who was the payee, the name of an additional party as maker after the note had been delivered as a perfect instrument against the original signers.

In passing on the correctness of the charge, it is important to ascertain the character of the note before the alleged alteration, and the relation to it of the original parties.

Wallace and Park v. Jewell.

Leaving out of view the defense of Park and Wallace that they signed upon the agreement that they were only to become bound as accommodation indorsers, which must have been found against them by the jury, the three held the relation to the note of original makers, Almon Rany being the principal, and Park and Wallace his sureties. *Seymour v. Mickey*, 15 Ohio St. 515; *Same v. Same*, 10 id. 283.

The question as to the character of the note has reference to whether it was joint as well as several. It is claimed on behalf of Jewell, the plaintiff below, that it was only the several notes of the parties, and that the addition of another maker in no way affected its legal character. The ground of this claim is, that the pronoun "I" is used in the body of the note, and it is said that this makes it the note of each signer, but not the joint note of all. The opinion in *Brownell v. Winnie*, 29 N. Y. 408, is cited as sustaining this claim.

We cannot assent to this view. The language, "I promise," etc., makes the joint or united as well as the several contract of all the signers. The pronoun represents the signers collectively as well as severally. The contention in the earlier cases was, that such a note was joint only, but we have found no case in which such a note has been declared not to be joint, except that of *Brownell v. Winnie*, *supra*; *Marsh v. Ward*, Peake, 130; *Clark v. Blackstock*, 1 Holt's N. P. 474; *Hemmenway v. Stone*, 7 Mass. 58; *Ladd v. Baker*, 26 N. H. 76; Story on Prom. Notes, § 57; Byles on Bills, p. 6.

There is nothing in the pleadings or in the bill of exceptions indicating that the addition of the name of "Rany Bros." was made for any other purpose than of adding an additional maker to the note. The charge assumes that to have been the character of the addition; for it states that the putting the name on the note after delivery was a material alteration.

If the object had been to guaranty payment, or to furnish additional security otherwise than by becoming or assuming to become a joint maker, there could be no objection to the accomplishment of such object. The new agreement in such case would be a collateral one, and it would leave the integrity of the original note unaffected. Nor do we suppose the case would be altered if in giving such security the new party should, by mistake or inadvertence, sign the note in such way as to indicate *prima facie* that he was an original promisor, the real intention being otherwise. Such a case would fall

within the principle decided in *Ex parte Yates*, 2 De Gex & J. 191.

In regard to what is said in the note as to the place of payment, we consider the stipulation as having no other effect upon the obligations of the parties than as specifying the place of payment. The meaning would be the same if, in speaking of the mill, the name of the owner had been used instead of the possessive pronoun "my."

It is a general rule of law that the unauthorized material alteration of a written instrument by the holder, or with his consent, vitiates it as to non-consenting parties. The policy of the rule is to preserve the integrity of legal instruments by taking away the temptation of tampering with them.

But it is contended that the adding the name of an additional maker to a promissory note, although the instrument may at the time be held as a valid subsisting obligation against the other makers, does not constitute a material alteration. We are unable to accede to this position.

The question directly arose in *Gardner v. Walsh*, 5 El. & Bl. 84, and was there fully considered; and it was held by the court (overruling *Catton v. Simpson*, 8 A. & E. 136), that the addition of the name of another as maker was a material alteration, and, if made after the note was issued, would avoid it. In the opinion in that case, it is said: "If, after the note is a perfect instrument, according to the intention of the parties, as the joint and several promissory note of the defendant and Elizabeth Barton, and after it had been 'completed, issued and negotiated,' the plaintiffs, without the consent of the defendant, had caused it to be signed by Alice Clarke, as a joint and several maker, along with the defendant and Elizabeth Barton, according to principle and authority, he is discharged from his liability upon it. There would be no difficulty in showing that, under certain circumstances which might have supervened, this alteration might have been prejudicial to the defendant. But we conceive that he is discharged from his liability, if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice."

The decision is but the application of the general principle in regard to the alteration of instruments, to the particular mode of changing their legal meaning and effect by adding new parties with-

out the consent of those originally bound. The principle is directed not against the mode but the fact of alteration.

The case of *Gardner v. Walsh* has generally been followed, both in this country and in England. 1 Smith's L. C., *Master v. Miller*, notes, p. 956; Addison on Contracts, 812; 2 Parsons on Notes and Bills, 556; Thompson on Bills, etc., 112; *Henry v. Coats*, 17 Ind. 162; *Bowers' Adm'r v. Briggs*, 20 id. 139; *Hall's Adm'r v. McHenry*, 19 Iowa, 521; *Chadwick v. Eastman*, 53 Me. 12; *Shipp's, Adm'r, v. Suggetts, Adm'r*, 9 B. Monr. 8; *Chappell v. Spencer*, 23 Barb. 584.

The case last named is said, by counsel of the defendant in error, to have been overruled by the cases of *Cobb v. Titus*, 10 N. Y. 199, and by *Brownell v. Winnie*, *supra*. In each of these cases the action was against the new signer, and the case of *Cobb v. Titus* was decided several years before the case of *Chappell v. Spencer*.

The case of *McCaughey v. Smith*, 27 N. Y. 39, is more nearly in point. In that case the action was against the indorser of a note to which the name of a new party, apparently as maker, had been added after the defendant's indorsement and without his consent. The decision was by a divided court, five of the judges concurring and three dissenting. In the opinion of the majority, speaking to the point of the effect of an alteration, it is said: "It is certainly the result of the later authorities that the addition of another maker to a note, made by one or more parties, is a material alteration of the contract. Instead of being the several or the joint obligation of the original party or parties, it becomes the joint or joint and several undertaking of different contractors. It is not material whether the change be prejudicial or the contrary; it is sufficient that it is material." *Gardner v. Walsh* and *Chappell v. Spencer* are cited as supporting the doctrine. The opinion then proceeds to state that "there is a difference between the present case and these, however, which must not be lost sight of;" and while the rule is not controverted, it is declared not to be applicable, in the opinion of the majority of the judges, to the case then before the court.

The rule applies, of course, only where the name of the new party is added in the character of maker.

Such an addition gives a different legal character to the instrument. The defendants might, by the altered condition of the note now in question, have been subjected to change of jurisdiction in the event of any litigation arising in relation to it between the parties. *Shipp's, Adm'r, v. Suggetts, Adm'r*, 9 B. Monr. 7.

 Lorillard Fire Ins. Co. v. McCulloch.

In regard to the suggestion of counsel that Rany Brothers were not bound, and the further observation that the adding of their names imposed no more legal liability upon prior parties than if their names had been forged to the note, we may remark, that no alteration, whether it amounts to forgery or not, is, in fact, binding upon the non-consenting parties. If the legal operation of the instrument in its altered condition is different from the one they executed, it is sufficient for them to say of the contract evidenced by the altered instrument, into this we never entered.

The charge in the present case assumed that the adding of the name of the new party materially altered the note, but made its legal effect depend on what the plaintiff, at the time, conceived to be its effect, and on what he then designed as to the future use of the note. This, of course, involved what he conceived to be the legal character of the note before the alteration. The effect of a material alteration is thus made to depend, not upon the actual fact as to the character of the instrument before and after the alteration, but upon the conceptions and design of the holder at the time of the alteration. If the parties intended to do what they have apparently done, added a new party to the note in the character of maker, its vitiating effect cannot be avoided by the conceptions of the plaintiff as to the character of the act, nor by his design in respect to the future use of the note.

Judgment reversed, and cause remanded for a new trial.

NOTE. — See note to *Holmes v. Trumper*, 7 Am. R. 669. — REP.

LORILLARD FIRE INS. CO., plaintiffs in error, v. MCCULLOCH.

(21 Ohio St. 176.)

Fire insurance — false representation.

A person in possession of premises, under a contract of purchase, having paid only part of the purchase-money, the rest not being due, obtained a policy of fire insurance on the premises, and in his written application, which was made a part of the policy, answered the questions propounded as follows: Question. "Is the property owned and operated by the applicant?" Answer "Yes." Question. "Is any other person interested in the property — if so

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state the interest?" Answer. "No." Question. "Incumbrance—is there any on the property?" Answer. "Held by contract." *Held*, that the answers were substantially true, and that the policy was not avoided for false representations.

ACTION on a policy of fire insurance. Plaintiff being in possession of premises under a contract of purchase, having paid a part of the purchase-money, the rest not being due, applied for a policy of insurance to defendants, and, in his written application, which was made a part of the policy, he answered the questions propounded as follows: Question. "Is the property owned and operated by the applicant?" Answer. "Yes." Question. "Is any other person interested in the property—if so, state the interest?" Answer. "No." Question. "Incumbrance—is there any on the property?" Answer. "Held by contract." The policy was issued, and contained the following condition:

"And the said applicant hereby covenants and agrees to and with the said company that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property to be insured, as far as the same are known to the applicant and material to the risk, and the same is hereby made a condition of the insurance and warranty on the part of the insured."

The court of common pleas held that the policy was avoided for false representations or false warranty, and judgment was rendered for defendants. The district court reversed this judgment, whereupon defendants appealed to this court.

E. Somers, for plaintiff in error.

G. M. Barber and *S. J. Andrews*, for defendants in error.

WELCH, J. It is, perhaps, not seriously denied, that the interest of the defendant in error in the property was an insurable interest. That it was such, we have no doubt. The ground relied upon for the avoidance of the policy is an alleged breach of warranty, consisting in the fact that the answers given to the questions contained in the written application were not full answers, and also in the fact that they were false.

In regard to the former ground of objection, it seems to us sufficient to say, that the receipt of the application, and the insurance

of the policy thereupon, was a waiver of the questions in so far as they remained unanswered, and that the policy cannot, therefore, be avoided by the company on the ground that the answers are not full. The objection should have been made at the time of the receipt of the premium, and the issuance of the policy, or not at all. Had further answers been insisted upon at that time, the applicant would doubtless have given them. To receive this premium, and issue the policy upon the answers as given, and afterward avoid the policy on the ground that the answers were not full, would be to practice a virtual fraud upon the insured.

But are the answers false? We think not. Taken together, and construed as a whole, they are substantially true. To the question whether he owned the property, the assured answers, "yes;" to the question whether any person has an interest in it, he answers, "no;" and to the question whether there are any incumbrances upon it, he answers that it is "held by contract."

It is contended that, even admitting the interest of the defendant to be an insurable interest, and that the title of a purchase by mere contract is sufficient to justify a warranty of ownership, yet these answers are false, because they do not disclose the fact that there was a *lien* for unpaid purchase-money, but, on the contrary, allege that no other person has an interest in the property. The three answers, it is said, can only be reconciled and sustained as true, upon the theory that the purchase-money had been all paid, and that the equitable title of the defendant was thus made complete. We do not so understand the answers. The answer which sets forth that the property was "held by contract," is made in response to the question whether there was any "incumbrances" upon the property. We think it was fairly to be inferred from this answer, made in this connection, that there was such an incumbrance as usually exists in such cases, namely, a *lien* in favor of the vendor for purchase-money. Substantially, the answers amount to this: "The property is held by contract of purchase merely, and is subject to no incumbrance except what that description of ownership implies; I am the owner of that title; and I am the sole owner." Understood in this sense, the answers are substantially in accordance with the facts of the case.

Judgment affirmed.

PICKENS v. Diecker.

PICKENS, plaintiffs in error, v. DIECKER.

(21 Ohio St. 212.)

Master and servant — Liability of master for acts of servant.

J. S., the agent of defendants, was traveling for them under no particular orders as to the mode of travel he should adopt. At W., without disclosing his principals, he hired of plaintiffs, who were livery stable keepers, a team and buggy. At St. M., while the horses were standing in front of a store in which J. S. was transacting business as agent for defendants, the horses took fright and broke the bridle by which they were hitched, but were caught before any damage was done. The horses were then tied by a halter, which was fastened around the neck of the near horse. J. S. took the broken bridle to a shop to be repaired, and after finishing his business at the store he undertook to lead the team to the shop by the halter around the neck of the near horse. On the way one of the buggy wheels struck a stone, thereby causing some paper boxes to be thrown out of the buggy and frightening the horses, and J. S. not being able to hold them by the halter, they broke away and caused damage to the buggy, harness, and to one of the horses, for which action was brought. *Held*, that J. S. was negligent; and that defendants were responsible for the damage resulting from his negligence.

ACTION for damages. The opinion states the case.

Lee & Brown, for plaintiffs in error.

Layton & Layton, for defendants in error.

WHITE, J. The object of this proceeding is to obtain the reversal of the judgment of the district court affirming the judgment of the court of common pleas. On the trial the case was submitted to the court without the intervention of a jury, upon an agreed statement of facts.

It appears from the statement that the plaintiffs in error, the defendants below, were wholesale dealers in millinery and straw goods in Toledo, and had in their service as a salesman and traveling agent one Wright, who was hired by the year on a salary. Wright's duties required him to stay in the store, or travel, soliciting orders for goods and making collections, as his employers might direct. When in the store he paid his own board; when traveling his expenses were allowed to him, and paid by his employers. At the time of

the transaction in controversy he was traveling under his employment with the plaintiffs in error, but he had no particular instructions, nor was he under any orders as to the route or mode of travel he should adopt. At Wapaukanetta Wright, without disclosing his principals, hired of the plaintiffs below, who were livery stable keepers, a team and buggy to go to Celina and St. Mary's. At St. Mary's, while the horses were standing in front of a store in which Wright was doing business, they took fright and broke the bridle by which they were hitched, but were caught before any damage was done. The horses were then tied up by a halter, which was fastened around the neck of the near horse. Wright took the broken bridle, which belonged to the near horse, to a shop to be repaired; and after finishing his business at the store he undertook to lead the team to the repair shop by the halter around the neck of the near horse. On the way one of the buggy wheels struck a stone, thereby causing some paper boxes to be thrown from the buggy. This frightened the horses, and Wright not being able to hold them by the halter, they broke away and thus caused the damage to the buggy, harness and to one of the horses, for which the action was brought.

The foregoing is the substance of what is embraced in the agreed statement.

The court found in favor of plaintiffs below, and assessed their damages. The defendants made a motion for a new trial, which was overruled and judgment rendered on the finding. Two grounds of error are relied on by the counsel of the plaintiffs in error:

1. That on the facts Wright was not guilty of negligence.
2. That in the hiring and use of the team he was not the servant or agent of the plaintiffs in error.

We think both propositions were correctly decided by the court below.

As to the question of negligence, it may be remarked there is no claim that the horses were more liable to take fright than horses ordinarily are. The only question, therefore, is, whether Wright was in the exercise of due care in attempting, under the circumstances, to lead the horses to the shop where the bridle had been left for repairs, from the place at which they were hitched, with no other means of guiding or holding them than the halter. They had but a short time before broken away through fright, and it was not reasonable to suppose they had entirely recovered from its effects. Ordinary prudence would, it seems to us, under

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the circumstances, have dictated that he should have gone to the shop and brought the bridle to where the horses were, rather than have attempted to take them, in the manner he did, to the shop to get the bridle.

We think it quite clear that in the hiring and use of the team Wright was acting as the servant or agent of the plaintiffs in error; and, consequently, they were liable for the hire and for the negligence of Wright in the use of the team.

The question is, whether Wright is to be considered as the servant or agent of the plaintiffs in error, or as a contractor exercising an independent employment.

The general rule is, that the master is liable, in law, for the negligence of the servant, through whom, in legal contemplation, he is said to act while in his employment. But when the person employed is in the exercise of an independent employment, and not under the immediate control, direction or supervision of the employer, the latter is not liable for the negligence of the former. *De Forrest v. Wright*, 3 Mich. 370; *Sadler v. Henlock*, 4 El. & Bl. 570; *Forsyth v. Hooper et al.*, 11 Allen, 421.

In the present case, Wright, in respect to his employment, was, at all times, subject to the will of his employers, and could not, consistently with his duty to them, refuse to obey their directions in the performance of the service for which he was engaged. It was not necessary that they should, in fact, exercise such control. If they had the authority to the extent indicated, the fact that they chose to leave the details to his discretion would not alter the relation of the parties.

We think Wright was a mere servant or agent, and cannot be regarded as a contractor within the meaning of the cases bearing on the subject. *Shearm. & Redf. on Neg.*, §§ 73, 76. His contract of employment did not bind him to produce any given result. His time belonged to his employers, and he was entitled to be paid irrespective of results.

Motion overruled.

PHIFER, plaintiff in error, v. COX.

(21 Ohio St. 242.)

Highway — removal of obstructions — nuisance.

The owner of land appropriated to a highway retains his exclusive right in trees and shrubs growing on the land so appropriated, for every purpose not incompatible with the public right of way, and he may maintain an action against an individual who, not acting under statutory or official authority, destroys or removes the trees and shrubs standing or growing in the highway, unless they constitute an obstruction, hindrance or annoyance to travelers. (*See note, p. 62.*)

ACTION brought by John Cox against Emanuel Phifer. The action was originally commenced before a justice of the peace of Hancock county, and was appealed to the court of common pleas. The opinion sufficiently states the facts. The following are the charges and requests to charge, referred to in the opinion:

“While the supervisor might at any time have caused and directed the road to be opened its extreme width, yet he was not bound to open the same wider than the convenience of the public in fact required. The trees growing, and the fences constructed upon the ground allowed to be opened for public use as a highway, remain the property of the owner of the fee, and if they existed within the limits of the new road at the time of its establishment, the owner is under no special obligation to remove the same; nor will the sufferance of their continuance make them a nuisance so as to authorize a private person, unauthorized by the supervisor, to remove the same unless they in fact subject him to a substantial and material hindrance and inconvenience in the exercise of his right, in common with other citizens, to the use of the road as a public highway. An authorized road once opened, or, in fact, used by the public as a highway, becoming obstructed so as to work a positive inconvenience or damage to a citizen in its proper use, such obstruction may be summarily removed with impunity by the act of such citizen.

“If the jury shall find in this case that the defendant, in entering upon the plaintiff’s close, was the supervisor of the road district in which such lands lay, or was duly authorized by such supervisor to enter upon such land for the purpose of opening or widening such

highway, and that the hedge, bushes or fence removed were within the limits of such authorized highway, and, even in the opinion of the supervisor, an obstruction in the way of the public use of such ground for the purpose of such highway; or if the jury shall find that prior to the alleged trespass the public had been in the peaceable enjoyment and use of said grounds covered by said hedge or fence, and the existence of the same was a hindrance to the enjoyment of such highway, and that the defendant in removing the same was guilty of no wanton or unnecessary injury to the owner of such property, then, and in either case, your verdict should be for the defendant. * * * Whatever hurts, annoys, inconveniences or damages a person in the enjoyment of a right, is a nuisance in its general acceptation. As applied to this case, whatever hindered or inconvenienced the defendant in his right of transit over the road in question may be regarded as such nuisance."

The defendant excepted to the charge, and requested the court to charge the jury: "That if they should find that the hedge row stood within the limits of the public highway forty feet wide, and within ten feet of the center of the same, it was *prima facie* a nuisance, and the defendant had a right to remove it, doing no unnecessary damage to the plaintiff;" which charge, as asked, the court refused to give, but did charge the jury: "That if they should find that the hedge row stood within the limits of the public highway forty feet wide, and within ten feet of the center of the same, it was *prima facie* a nuisance, and the defendant had the *prima facie* right to remove it, doing no unnecessary damage." Defendant excepted, and asked the court to further charge the jury: "That the defendant was entitled to the use and enjoyment of the whole of the highway, and the plaintiff had no right to appropriate any portion of it to his own exclusive use, and, if the plaintiff allowed the bushes to stand permanently for an unreasonable length of time upon the said highway, they became thereby a public nuisance, and the defendant could not be liable for cutting them down;" which charge, as asked, the court refused to give, and the defendant excepted. The court further charged the jury: "That if the road had been opened and used after having been established, it makes no difference whether a formal order had been issued by the commissioners or not; the use of such road after such establishment would be an appropriation by the public, and would entitle the defendant to remove any nuisance which he might find upon the same; that,

to entitle the defendant to cut down the bushes in the road, it was not necessary that he should be hindered or inconvenienced in his passing along the same."

The judgment rendered was against the defendant, who filed his petition in error in the district court, and assigned for error the refusal of the court to charge as requested, and the charge as given; also the overruling the motion for a new trial. The district court reserved the case for decision in this court.

Whiteley & Blackford, for plaintiff in error.

Jas. A. Bope and Wm. Griffen, for defendants in error.

DAY, J. The action was brought to recover damages for the wrongful destruction of part of a hedge fence standing and growing on the premises of the plaintiff. It appears that a county road had been established, embracing within its limits the hedge in question. It does not, therefore, follow that the plaintiff had no right of action for the destruction of the hedge, for the establishment of the road did not extinguish his title in the land over which it passed. The public acquired thereby a mere easement—a right of way, with the powers and privileges incident to that right. The owner of the fee still retained his exclusive right in the trees and herbage growing on the land, for every purpose not incompatible with the public right of way, and he may maintain an action in respect to them, when not taken for the purpose of making or repairing the road, or lawfully abated as a hindrance or annoyance to travelers thereon. *Jackson v. Hathaway*, 15 Johns. 447; *Adams v. Emerson*, 6 Pick. 56; *Washburne's Eas. and Ser.* [*159]

These, then, being the general rights of the public and the owner of land appropriated to a highway, to what extent may an individual, not acting under statutory or official authority, be justified in destroying trees and shrubs standing and growing in a public highway? This is the principal question in the case, and must not be confounded with the right of the public in such cases acting through its officers or by appropriate judicial proceedings. An individual cannot needlessly and wantonly destroy them, for that would be inconsistent with the rights of the proprietor of the soil, and transcend the bounds of the easement acquired by the public, when not necessary to the enjoyment of a right of way. So long as that is

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unobstructed, there is no reason why the easement of a highway should afford a justification to an individual for the needless destruction of property belonging to the owner of the land, merely because it happens to be within the bounds of the road as laid out and established. But whenever such property works an annoyance, hindrance or inconvenience to travelers, it becomes a public nuisance, and may be abated or removed by any one who wants to use the road in a lawful way. Angell on Highways, § 274; 3 Black. Com. 5. "But it is a general rule, that the abatement must be limited to its necessity, and no wanton or unnecessary injury must be committed." 2 Salk. 458; 3 Cooley's Black. 5, note; and 15 Ad. & El. N. S. 283. "And the reason," says Blackstone, "why the law allows this private and summary method of doing one's self-justice is, because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow forms of justice." It would seem, then, that the remedy, by summary abatement, ought to be tolerated only where there is an annoyance bringing the injury within the reason of the rule which allows it. The right of an individual to abate an obstruction in a highway, therefore, must depend upon the fact whether it is a hindrance or annoyance to travelers; that is, whether it is a public nuisance, and, of necessity, is a question in every case to be decided by a jury.

This view of the case is sustained by authority as well as reason.

Angell, in his treatise on highways (§ 274), says: "Neither does this right of abatement, as has been held, go to the extent of justifying the removal of every encroachment upon the highway, unless such encroachment, at the same time, annoys and obstructs its lawful use."

So, in *Evans v. The City of Cincinnati*, 2 Handy, 236, it was held that in no case, unless the obstruction impedes the free use of the street, can an individual resort to the summary remedy of abatement.

So, in *Harrower v. Ritson*, 37 Barb. 301, it was held that the jurisdiction of a defendant, who had torn down a fence extending into the highway, was limited by the necessity of the case, and, if the use of the road was not interfered with, he was a trespasser in removing the fence.

In *Hopkins v. Crombie*, 4 N. H. 520, where a building extended about ten feet into the highway, but did not cover or obstruct any

of the traveled part thereof, the court held the encroachment not to be such a nuisance as could be abated by an individual unless it actually obstructed his passage.

The same principle was upheld in *Graves v. Shuttuck*, 35 N. H. 257; and in *Mayor of Colchester v. Brooks*, 7 Ad. & El. N. S. 339; and in *Dimes v. Petley*, 15 id. 276.

So, in *Burnham v. Hotchkiss*, 14 Conn. 311, the court held that whether an obstruction is a nuisance or not is a question of fact for the jury, and that a summary abatement would not be justifiable unless the public travel was thereby actually obstructed, hindered or endangered. And this we think is the correct doctrine, both on principle and authority.

We therefore conclude that the charge of the court in the case in hand, and its refusal to charge as requested, were fully warranted and justified. The charge was, to say the least, as favorable as the defendant could properly ask; nor do we think any seeming inconsistencies in the charge could have operated to his prejudice; on the contrary, they were decidedly in his favor.

Nor do we think the court erred in overruling the motion for a new trial; for the evidence clearly sustained the jury in finding that the nedge of the plaintiff was no obstruction, hindrance or annoyance to travelers, or to the defendant, in the lawful use of the road, there being ample space left for them for that purpose.

It follows that the judgment of the court of common pleas must be affirmed.

Judgment affirmed.

NOTE.—See also *Griffith v. McCullum*, 46 Barb. 551, wherein it was held that if the encroachment of a fence upon a highway is of such a nature that no one, in using the highway, is incommoded by it, it is not such a nuisance as can be abated by an individual. Although one injured may abate a nuisance obstructing a highway and remove the materials, yet he cannot convert them to his own use. In *Cole v. Drew and wife*, *post*, the defendant's wife, under the direction of the highway surveyor, cut the grass along the highway adjoining plaintiff's land, in order to make the highway suitable to her children passing to and from school, and fed the grass so cut to her husband's horse. Held, that she had the right to cut the grass, but by feeding it to the horse she became a trespasser *ab initio*.—RER.

Calahan v. Babcock.

CALAHAN, plaintiff in error, v. BABCOCK.

(21 Ohio St. 281.)

Stoppage in transitu.

B. & Co. of New York sold on credit, and consigned in the ordinary way to "Geo. T. Hull, Youngstown, Ohio, A. & G. W. R. R.," goods which arrived at the Youngstown station and were transferred by the railroad company's agent to its freight depot, where they awaited payment of charges as a condition precedent to their removal by draymen to Hull's place of business. On the evening of the day of the arrival of the goods they were seized in attachment at the suit of creditors of Hull. *Held*, that B. & Co. might assert the right of *stoppage in transitu*.

ERROR to the court of common pleas of Mahoning county.
Reserved in the district court.

The opinion states the case.

Thomas W. Sanderson (of *Sanderson & Jones*), for plaintiffs in error.

Hutchins & Gliddin, for defendants in error.

WEST, J. This action was tried on submission to the court at the January term, A. D. 1868, of the Mahoning common pleas, on an agreed statement of facts, and two depositions offered by the plaintiffs in error; all of which evidence was, by bill of exceptions, incorporated into the record, and is now before this court. Judgment having been entered against the plaintiffs in error, and a motion by them for a new trial because, 1st. The judgment was against the law; 2d. Was not sustained by the evidence; and 3d. Ought to have been for and not against them, having been overruled, the cause was removed by petition in error into the district court of Mahoning county, whence, for want of time to conclude its hearing, it was taken to the district court of Portage county, wherein it was reserved for decision in this court.

The record shows that on the 25th of September, 1866, Babcock & Co., merchants of New York, sold on credit and consigned

in the ordinary way to the address of "Geo. T. Hull, Youngstown, Ohio, A. & G. W. R. R.," goods agreed on the trial to be of the value of \$1,618.77, which, on the 3d of October, 1866, arrived at the Youngstown station and were transferred by the railroad company's agent to its freight depot, where, in the evening of the same day, they were seized in attachment, the charges thereon paid, and the goods thence removed by the plaintiffs in error, then sheriff and deputy sheriff of Mahoning county, at the suit of sundry creditors of Hull, a retail merchant of Youngstown, who, pending the transit of the goods, had become insolvent.

Merchandise consigned to Hull was usually called for at this depot, the charges paid thereon, and it carted and delivered to Hull at his place of business by draymen, without special directions from him. At the time the goods in controversy were seized, Hull had no knowledge of their arrival, and had given no directions in regard to them; nor had any drayman or other person called for or demanded them. They were awaiting the payment of charges as a condition precedent to their transfer and removal by draymen to Hull's place of business. No one having charge of the freight depot, custody of the goods, or in the employment of the railroad company had been constituted an agent of Hull.

The attorney of Babcock & Co., without their knowledge, and before either had learned that the possession of the goods had not passed in fact to Hull, commenced an action against him in Trumbull county for their purchase-price which, however, has not been prosecuted.

On the 8th of October, 1866, Babcock & Co. asserted their right of *stoppage in transitu* by making demand of the railroad company, and afterward of the plaintiff in error, and on the twelfth of October commenced this action.

These facts do not distinguish the case from the usual consignments of goods sold in the ordinary course of business between merchants. Several errors are assigned on the record, but the admirable and exhaustive arguments of counsel are chiefly — that of the plaintiffs in error exclusively — to the one involving the doctrine of *stoppage in transitu* which will first be considered.

I. (1) For the plaintiffs in error it is insisted in effect that if the facts in the case show the vendor's right of stoppage *not* to have been extinguished under the rule hitherto recognized, the novel method

of modern transportation demand that such restrictive modifications be engrafted thereon as will work its extinguishment.

This cannot be conceded. The right of *stoppage in transitu* is regarded with so much favor that the rule governing it will not be subjected to restrictions less liberal than those of immemorial prescription.

(2) It is further contended, however, that a rational application of the *principles* on which the rule is founded, to existing methods of the carrying trade, will hold the arrival of goods transported by railway at the station designated for their discharge the termination of the trust, and, consequently, of the right of stoppage.

This proposition is also untenable, either on authority or reason. The transit of goods consigned in the usual general terms, by a vendor on credit, is terminated, and his right of stoppage extinguished only when their possession is voluntarily and actually transferred to the vendee or to his agent. But the carrier of goods thus consigned, and all *middlemen* into whose custody they pass, in furtherance and virtue of the consignment are, by implication of law, constituted agents of the vendor, not of the vendee. Therefore, the transfer of goods consigned, as in this case, from the coaches of the carrier by railway to his freight depot or warehouse at the station designated for their discharge, in the vicinity of the vendee's residence or place of business, there to await the payment by him of the charges thereon, as a condition precedent to their removal to and delivery at his business house, does not *ipso facto* constitute a transfer or delivery of possession to him, or to any one as agent of and for him; but is the reasonable exercise of a right and duty by the carrier, in the course and furtherance of their transit, referable to and in virtue of his original employment by and as agent of the vendor to transport and deliver. Wherefore, until the vendee in person, or his agent under and for him, shall become custodian in possession, neither the transit of the goods nor the vendor's right of stoppage will be held to have terminated.

It is not intended to intimate that the middleman may not become the agent of, and, as such, the custodian holding possession under and for the vendee. But such agency will not be implied from the carrier's original employment, and can arise only by showing affirmatively some arrangement or understanding to that effect other than the general words of an ordinary consignment. No such arrangement or understanding is disclosed by the evidence in this

case. The custody of the goods, at the time of their seizure in the carrier's depot, was, therefore, in the agent of the vendor, whose right of stoppage was consequently subsisting in full vitality at that date.

II. The seizure of goods *in transitu*, at the suit of the consignee's creditors, does not extinguish the vendor's right of stoppage, but furnishes him a cause of action for them, or their value, against the officer making the seizure, which will be enforced if asserted in due time.

III. The commencement of an action against the vendee by the attorney of the vendor of goods on credit, for their purchase-price, without the vendor's knowledge, and before either has been apprised that their *transitus* has not terminated, does not constitute a waiver of the right of stoppage, if it be asserted in a reasonable time, and the action for their price be not pressed, which the record shows to have been the facts in this case.

IV. The cause of action upon which judgment was rendered by the common pleas against the plaintiffs in error, sounded in tort, upon which it was not competent to award interest at a rate exceeding six per centum per annum. Wherefore so much of the judgment of the common pleas as awards interest thereon after its rendition at seven per centum will be annulled, and the judgment to this extent modified, at the costs of the defendants in error; and, as to the residue, will be affirmed and remanded for execution.

Judgment accordingly.

PHILLIPS, plaintiff in error, v. DUGAN *et al.*

(21 Ohio St. 463.)

Judgment in action on coin contracts. Costs.

In an action on a promissory note, payable in gold or silver, the judgment, in case of recovery, must be for coin to the amount found due on the note and interest. The judgment for costs must be general, so that it may be satisfied by payments of either kind of lawful money.

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ACTION on a promissory note, of which the following is a copy :

"\$150.

FOWLER, *May 23, 1859.*

"One day after date, for value received, we, or either of us, promise to pay Horatio N. Phillips, or order, one hundred and fifty dollars, to be paid in gold or silver, if required, at eight per cent interest, to be paid annually.

"MILO DUGAN,

"AUSTIN DUGAN,

"LAURA DUGAN."

Indorsed on the note was the following:

"FOWLER, *Nov. 12, 1864.*

"Received on the within note the interest up to the present date, \$80.45."

Payment of the note, in gold or silver, was demanded November 12, 1864. This action was commenced April 17, 1866. The case was submitted on the following agreed statement of facts:

"It is agreed that the note sued upon was given for specie lent at the date thereof; that demand of payment was made as stated; and that gold and silver were then at a premium of 55 cents in legal tender United States currency; that the defendant then paid, in United States legal tender currency, the sum expressed by the indorsement, as interest to that date, \$81; that gold, at the commencement of this suit, was at a premium of 25 cents, and silver at a premium of 20 cents—gold selling at \$1.25 and silver at \$1.20 for the dollar."

The plaintiff claimed that he was entitled to recover for the breach of the contract the value of coin at the time of the demand of payment; but the court held that he was only entitled to recover \$150, the amount specified in the note, and interest from November 12, 1864, for which sum, amounting to \$163.80, judgment was rendered in favor of the plaintiff, to which holding and judgment he duly excepted.

To reverse this judgment, the plaintiff filed his petition in error in the district court. The case was reserved in the district court for decision in this court.

Milton Sutliff, for plaintiff in error.

Taylor & Jones, for defendants in error.

DAY, J. The determination of the questions presented in this case depend upon constructions to be given to the legislation of congress, known as the legal tender acts. Upon questions of this class, the supreme court of the United States is the ultimate tribunal, and its decisions are decisive of the case before us.

Without repeating here the reasoning upon which those decisions are based, it is only necessary to state the leading principles settled by that court, and apply them to the questions raised in this case.

In the late cases of *Knox v. Lee* and *Parker v. Davis*, 12 Wall. 457, after much deliberation, it was decided by that court, that the legal tender acts of congress are constitutional and valid, as applied to contracts made both before and after their passage.

In the more recent case of *Trebilcock v. Wilson*, 12 Wall. 687, affirming the decision in the earlier case of *Bronson v. Rhodes*, 7 Wall. 229, it was held "that express contracts, payable in gold or silver dollars, could only be satisfied by the payment of coined dollars, and could not be discharged by notes of the United States declared to be a legal tender in payment of debts." Again, in the same case, it is said: "If we look to the act of 1862, in the light of the contemporaneous and subsequent legislation of congress, and of the practice of the government, we shall find little difficulty in holding that it was not intended to interfere in any respect with existing or subsequent contracts payable by their express terms in specie; and that, when it declares that the notes of the United States shall be lawful money, and a legal tender for all debts, it means for all debts which are payable in money generally, and not obligations payable in commodities, or obligations of any other kind."

It was also held in that case that, under the coinage and legal tender act of congress, we have "two kinds of money, essentially different in their nature, but equally lawful," and that, therefore "contracts payable in either, or for the possession of either, must be equally lawful, and, if lawful, must be equally capable of enforcement."

In the same case, it was further held that, as both kinds of money are "expressed by similar designations," making judgments for the payment of dollars generally, though based upon obligations to pay coin, payable in depreciated note dollars, it became necessary, "to avoid ambiguity and prevent a failure of justice, to allow judgments to be entered for the payment of coined dollars, when that kind of

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money was specifically designated in the contracts upon which suits were brought."

In this manner, while two kinds of lawful money, differing in commercial value, are recognized, contracts payable in either may be enforced in accordance with the just rights and obligations of the parties. It is, moreover, the only mode sanctioned by that court, in which parties can obtain the full benefit of contracts payable in coin, when it is of a greater commercial value than legal tender notes; for, in the recent case already referred to, the previous holdings of the court in *Butler v. Horwitz*, 7 Wall. 258, and in *Dewing v. Sears*, 11 id. 379, were fully sustained. In both of these cases general judgments had been rendered by the State courts for an amount equivalent to the market value of that stipulated to be paid in coin by the terms of the contracts on which the suits were brought. The judgments were reversed, and the cases were remanded to the State courts for judgments payable in coin. In the former case, it was said by the chief justice: "The damages should have been assessed at the sum agreed to be due, with interest in gold and silver coin, and judgment should have been entered in coin for that amount, with costs." In the latter case, it was said that the judgment "should have been entered for coined dollars and parts of dollars, instead of treasury notes equivalent in market value to the value in coined money of the stipulated weight of pure gold."

It follows from these decisions that in the case before us the plaintiff was not entitled to recover, in addition to the amount called for by the note in suit, the currency premium on coin. The court so held, and, to that extent, rightly. But the judgment rendered for the right amount was general, and might be satisfied lawfully by payment of the same amount of legal tender notes; thus, by the judicial action of the court, a contract payable in coin was reduced to a debt of the same amount that might be discharged by legal tender notes. This, by reason of the depreciated comparative value of such notes, was decidedly prejudicial to the interests of the plaintiff, and practically amounted to a denial of his legal rights under the note in suit, as settled by the decisions before referred to.

The note was given for coin loaned to the defendants. They expressly contracted to pay it in gold or silver. The plaintiff did nothing to waive his right to payment in specie. On the contrary, he demanded payment in coin, and in his action on the note he relied upon it as a contract for coin. He was entitled to judgment

in such form as would give him his legal rights, and secure to him the full benefit of his contract when discharged by payment.

Inasmuch as United States legal tender notes were the general standard of commercial value in the country at the time the action was brought, it was no uncommon error to suppose that the only way to obtain the full benefit of a contract expressly payable in coin was to procure a judgment for an amount of equivalent value, payable in such notes. The plaintiff, it is true, fell into this mistake in the *form* of the judgment asked in his petition, but it embraced the *substance* of the remedy to which he was entitled, the full value of his note. It is, however, sufficient to say that in cases where parties have sought the same form of remedy on coin contracts as that claimed in this, the supreme court of the United States have decided that it was the *duty* of the court, in order that the legal rights of parties may be preserved, to render judgments expressly payable in coin. This ruling we feel bound to follow.

This, it is true, is new in the practice of this State. But the necessity for it, growing out of a new kind of legal tender in the payment of debts, is of recent origin. The modification of judgments required, however, is nothing more than making them conform to the new order of pecuniary affairs, by expressing which of two kinds of lawful dollars, of different relative values, the party is justly and legally entitled to recover in satisfaction of his claim.

Nor does this form of remedy on coin contracts conflict with the code of civil procedure. On the contrary, its provisions are amply sufficient to warrant judgment, in accordance with the rights of the parties. Nor will any insurmountable difficulty arise in carrying a judgment for coin into execution. The same necessity which occasioned such judgments will continue in the further proceedings thereon by final process for the satisfaction thereof; for the requirement to pay a judgment in coin by necessary implication must authorize and require the collection of coin by legal process for that purpose. See *Lane County v. Oregon*, 7 Wall. 71. This will require no change in the mode of procedure, except that appraisements and sales of property, so far as necessary, must be for coined dollars instead of note dollars.

It follows that the judgment of the court of common pleas, reducing a contract payable in coin to a debt of the same amount payable in legal tender currency, was erroneous and must be reversed.

The case being one in which the statute authorizes this court to

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render the judgment that should have been rendered by that court, a judgment for coin will be entered here for the amount found to be due on the note and interest. But the judgment for coin will not embrace the costs of suit. The judgment for costs must be general, so that it may be satisfied by payments of either kind of lawful money.

Judgment accordingly.

MILLER, plaintiff in error, v. WOODS.

(21 Ohio St. 485.)

Promissory note — fraud — condition precedent to commencement of action.

In an action on a lost promissory note, the defense was, that defendant had given \$300 and a new note to plaintiff in satisfaction of the lost note. In reply to this defense, plaintiff alleged that he had been induced to accept the \$300 and the new note by defendant's fraudulent representations. The judge ruled that plaintiff could not recover unless he had, before bringing his suit, offered to return the new note and the \$300. *Held* error, and that it was sufficient that the new note be brought into court ready to be given up or canceled on the trial; also, that the \$300 need not be produced at all, as it was paid upon the lost note.

ACTION on a promissory note for \$500 given by defendants to plaintiff, April 12, 1863. The petition averred that the note had been lost or destroyed, and offered to indemnify defendants in case it should ever be found. The defense was, that defendant Woods, who was principal debtor, had given plaintiff \$300 and a new note for the balance, in satisfaction for the lost note. In reply to this defense, plaintiff alleged that the \$300 and the new note were accepted by the attorney of plaintiff on defendant Woods' fraudulent representation that plaintiff was willing and had so agreed to accept them. At the trial plaintiff produced the new note to be canceled, if required, and also filed the \$300 with the clerk. The judge ruled that the plaintiff could not recover in the action unless he had, before bringing his suit, offered to return the new note and the \$300. Plaintiff excepted.

Under this ruling, the jury found a verdict for the defendants, and judgment was rendered thereon. To reverse this judgment.

petition in error was filed in the district court, and reserved for decision here.

F. E. Hutchins, for plaintiff in error.

Taylor & Jones, for defendants in error:

The plaintiff could not rescind without offering to return the money paid, and to cancel the new note. Offering to cancel the note at the trial, and, conditionally, to return the money after judgment, are not sufficient. *Kimball v. Cunningham*, 4 Mass. 502; *Conner v. Henderson*, 15 id. 319; Chitty on Cont. 681; 2 Kent's Com. 480, note *a*; *Burgett's Lessee v. Burgett*, 1 Ohio, 482; *Hoggins v. Bancroft*, 1 Dana, 30; *Jones v. Evans*, 6 id. 96; *Perly v. Balch*, 23 Pick. 283; *Bowley v. Brydon*, 12 id. 307; *Burton v. Studart*, 3 Wend. 236; *The Manhattan Co. v. Bently*, 13 Barb. 64; *Cain v. Guthrie*, 8 Blackf. 409; *Shaffer v. Slade*, 7 id. 178, 184, id. 501.

WELCH, C. J. If the court was right in its instruction to the jury, there was no material issue for them to try. The instruction was to the effect that, if all that the plaintiff alleges were true, he has no good cause of action, and that the jury should, therefore, return a verdict for the defendants.

Was the court right in its instruction? Was it necessary, in order to his right to recover, that the plaintiff should return, or offer to return, the money and the new note, before the commencement of his action? The authorities on the subject are conflicting. We are inclined to follow the ruling in the case of *Nickols et al. v. Michael et al.*, 23 N. Y. 264, where it was held that, in a case like the present, it is sufficient that the new security or note be brought into court, ready to be given up or canceled on the trial. We think this case stands supported by reason and the better class of authorities.

As to the sum of \$300 paid by Woods, we cannot see that the plaintiff was bound to do any thing even upon the trial. The money was paid upon the old note. Its payment was an act of duty and obligation on the part of Woods, and could form no part of the accord, or of the consideration for the agreement made by the plaintiff's attorney. It was an independent fact, separate and distinct from the execution of the new note, which formed the only real consideration of the alleged agreement.

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We think, therefore, that the court erred in its instructions in charging that the plaintiff was bound to tender or repay the money at all, and in holding that the plaintiff could not maintain his action without first offering to restore the new note.

Judgment reversed, and cause remanded for further proceedings.

THE CITY OF CINCINNATI, plaintiff in error, v. PENNY.

(21 Ohio St. 499.)

Municipal corporation — construction of sewers. Consequential damages.

Defendant, a municipal corporation, constructed, in a lawful and duly careful manner, a sewer, by making the excavation for which the lateral support to plaintiff's house was withdrawn, so that the foundation walls gave way. *Held*, that defendant was not liable in damages.

ACTION against a municipal corporation. The opinion states the case.

Morrill & Walker, for plaintiff in error.

Matthews, Ramsey & Matthews, for defendants in error.

MCILVAINE, J. This action is prosecuted to reverse the judgment of the superior court of Cincinnati, rendered against the plaintiff in error, and in favor of defendant in error.

The original action was brought in the court below by the defendant in error, against the plaintiff in error, to recover damages for injuries to the dwelling-house of the plaintiff, situate on a lot abutting on Borden alley, by reason of the construction of a public sewer in said alley by the defendant.

Issue being joined, the cause was submitted to a jury, and a special verdict returned as follows, viz.: "1st. We, the jury, find the defendant caused the sewer to be built, and the excavation made in the manner set forth in the plaintiff's petition, about thirteen feet deep. 2d. That the plaintiff's building was injured by reason of said excavation. 3d. That the defendants and their contractor, in making said excavation

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vation and building said sewer, took all reasonable and ordinary care to avoid injury to the plaintiff's property. 4th. We find the plaintiff's foundation was about four feet in the ground, and that such foundation was suitable for sustaining such structure at the time of its erection."

The jury also found the amount of plaintiff's damages to be \$900.

Thereupon, the defendant moved the court to render a judgment in its favor, upon the facts found in the special verdict; which motion was afterward, in general term, overruled and judgment rendered in favor of the plaintiff; to which ruling and judgment the defendant excepted.

There is no averment in the petition, as to "the manner in which the sewer was built and the excavation made," not denied in the answer, that can aid the special verdict in supporting the judgment rendered, except this, to wit: That the lateral support of the plaintiff's foundation-walls, from the street, was withdrawn by the excavation, so that they gave way.

The error relied upon is, that the judgment on the special verdict should have been for the defendant below and not for the plaintiff.

The only question arising in the case may be stated in the following form, viz.: Are municipal corporations, under the laws of this State, liable for damages to proprietors of lots abutting on streets and alleys for injuries to buildings erected thereon, resulting from the exercise of their corporate powers, in improving or appropriating such streets and alleys to public uses, while acting within the scope of their municipal authority, and without negligence or malice?

Strictly, this question should be answered in the negative. But, in the ordinary application of the principle involved, neither an unqualified affirmative nor negative answer would be a fair statement of the rule of law upon this subject.

If answered in the affirmative, this qualification should be annexed, namely, that the abutting proprietor has not contributed to his injury by his own negligence or indiscretion, in the manner of constructing his improvements. In applying this qualification, it is not enough to ascertain, simply, that he acted prudently under the circumstances of fact which surrounded him at the time; he must, also, have taken into consideration the right of the municipality to make future improvements in the streets or alleys, and to appropriate them to other public uses, within the scope of its authority. If

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these latter considerations were omitted, it was folly to omit them, and if injury results, it is his misfortune.

And if answered in the negative, this qualification should be annexed, to wit: That the municipality, before such lot was improved, had taken no such action in the matter of improving or appropriating such street or alley to public uses, as to reasonably indicate that the uses and improvements of the street or alley were permanently fixed and appropriated. Because, if the municipal authorities have so appropriated or improved the street or alley as to indicate, to a prudent and careful person, that no further exercise of the power of appropriation or change in the improvements of the street or alley would be made, they should not be permitted to further exercise it, to the injury of those who have acted upon the faith of their acts, without making compensation for such injury.

In thus stating the rule, we have no disposition to depart from the line of decisions formerly made by this court upon this subject, however much those decisions may be in conflict with the decisions of other courts. We believe the principles established by our former cases to be most just and equitable. On the one hand, public improvements and compensation for private property taken for public uses go side by side; and on the other hand, the general welfare of towns and cities is protected against the cupidity and perverseness of proprietors who take no interest in the public good, but take advantage of every circumstance that can possibly promote a private gain or save a personal expenditure.

We believe that all the cases heretofore decided by this court upon this subject can be reconciled upon the principles stated, although the language employed by different judges, in delivering opinions may not be reconcilable.

In *Goodloe v. Cincinnati*, 4 Ohio, 500, it was held that a municipal corporation was liable for injuries to a house where the street was illegally and maliciously cut down by the municipal authorities.

In *Smith v. Cincinnati*, 4 Ohio, 514, it was held that the corporation was liable for such injuries, in the absence of malice, if its acts were illegal.

In *Scovil v. Geddings et al.*, 7 Ohio, 562, it was held that the agents of the corporation were not liable for injuries to a house and lot, where no unnecessary damage was done, and they acted in good faith and under the authority of the trustees.

In *Hickcox v. Cleveland*, 8 Ohio, 543, it was held that the city

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was not liable where the municipal authorities acted without negligence and within the scope of municipal authority.

Rhodes v. Cleveland, 10 Ohio, 159, was a case where the injury complained of was to the land (and not to structures thereon), by causing it to be overflowed by water from drains and ditches. The corporation was held liable. But a distinction may well be taken between that case and one for injury to a building erected on a lot without reference to proper and reasonable drainage of the street.

The next cases are *McCombs v. Akron*, 15 Ohio, 474, and *Akron v. McCombs*, 18 id. 229. In these cases it was held that a municipal corporation is liable for injuries resulting from a change of grade, whereby the means of access to a building erected on an abutting lot were cut off or impaired. It appears, however, that the building was erected with reference to an established grade, and the injury resulted from a change in the grade. AVERY, J., in delivering the opinion of the court in that latter case, says: "He [McCombs] had made his improvements with an express view to the level and grade of Howard street, adjoining which the building stood."

Crawford v. Delaware, 7 Ohio, 459, is the first case in which the doctrine now approved was substantially enunciated. The court below had charged the jury as follows: "That a city or incorporated village, when acting within the scope of its corporate powers, is not liable to owners of lots in the village for injuries sustained by them by the grading of streets, unless such grading be wrongful. But, for such wrongful act, it is liable for resulting injuries, as fully as a natural person. That, when such corporation, in the exercise of its legal powers, makes a reasonable and proper grade of its streets, without touching or doing unnecessary injury to the unimproved property of owners along the streets so graded; and, when such grading is not unreasonable, improperly or wantonly done by such authorities, they are not guilty of such a wrong as will make them liable to action, even though some damage may result to such owners of property along the street by such grading. But where such grading is unreasonably, improperly or wantonly made, and injury results to owners, they are liable to the extent of actual damage sustained by such owner. That, when the owner of a lot builds upon and improves his lot in good faith, with reference to an established grade of a street, and the grade of such street is afterward so changed by the corporate authorities, as that the property of such owner is thereby substantially injured, such grading would be

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wrongful, so far as to render the corporation liable to make compensation for such injuries; for in such a case he would have a right to rely upon the continuance of the grade, with reference to which he made his improvements. That, where such corporation neglects to fix any grade, and none is established for a street, and the owner of a lot builds upon and improves his lot, in reference to the then existing state of the road or street used in front of his lot, and uses ordinary discretion and judgment in making his improvements, having reference to the probable future improvements of the town, and with reference also to the right possessed by the corporate authorities to make a reasonable and proper grade of such street, and he is afterward injured by the making of such grade, he is entitled to recover for actual damages he may sustain, even though the grade so afterward made may be a reasonable and proper one. But if he so locates his house, without such reasonable reference to future reasonable and proper improvements of the streets adjoining his lot, and without such exercise of discretion and judgment, and the town afterward makes such reasonable and proper grade, and he is thereby injured, he cannot recover for such injury."

This charge of the district court was under review upon error, and this court said: "We think the whole charge of the court below was as favorable to the plaintiff as the principles of law would justify."

It should be observed, however, that in this case the testimony tended to show that the value of the property was diminished only by impairing the facilities for ingress and egress. But we are of opinion that the same rule must apply in cases where the structures erected on abutting lots are injured by reason of the corporate acts.

The same doctrine is laid down in the case of *The Street Railway v. Cumminsville*, 14 Ohio St. 523, wherein it is said: "The acquisition of land for a highway of any kind carries with it the right to put the ground in a suitable condition to answer the purposes of the acquisition; and to this public right all private rights of lot owners are necessarily subordinated. If, before the public has exercised this right through the regularly constituted authorities, the lot is improved, the owner must do so with reference to its reasonable and proper exercise thereafter, and cannot complain if his means of access to his improvements are impaired through his own indiscretion. But when the public has taken possession and regularly defined the

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interests and improvements necessary for its uses, establishing grades, etc., lot owners have the right to assume this exercise of authority as a final decision of the wants of the public, and to make their improvements in reference to it."

How, then, stands this case? In 1867, the defendant below constructed a sewer in Borden alley, as it had a right to do; and in doing so it took all reasonable and ordinary care to avoid injury to the plaintiff's property. By making the excavation for the sewer, the lateral support to the plaintiff's house from the street was withdrawn, so that the foundation walls gave way. These foundation walls were suitable for sustaining such a structure at the time the house was built, which was several years before. At the time the house was built, and for many years before that time, Borden alley, by the laws of this State, was in the possession and under the control of the city for the purpose of drainage; and sewerage was a legitimate mode of drainage, within the scope of its authority. Before the plaintiff below built his house, the city had not, in any manner, as far as the record shows, indicated the nature or extent of drainage by sewers or otherwise that would be required for the public use. The plaintiff, without exercising any judgment or discretion, as to the reasonable and proper future use of the alley for sewerage purposes, erected his house on a foundation suitable only for sustaining such a structure at that time, and under the then existing condition of the alley. This was his own wrong, and he has no right to complain of an injury from the construction of the sewer (which was built in a proper manner), having neglected on his own part to exercise reasonable precautions against such injury.

Judgment reversed and cause remanded.

PASSENGER RAILROAD Co., plaintiff in error, v. YOUNG.

(21 Ohio St. 518.)

Master and servant — liability of railroad company for acts of conductors.

Plaintiff and wife were rightfully seated as passengers in one of the cars of defendant, a common carrier of passengers. By the procurement and order of the conductor, they were forcibly ejected therefrom, and thus received

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injuries for which action was brought. *Held*, that defendant was liable, notwithstanding the willfulness or wrongful motive of the conductor in doing the act complained of. (*See note*, p. 80.)

ACTION against a street railroad company. The opinion states the case.

Judgment for plaintiff. Defendant brought a writ of error.

E. A. Ferguson, for plaintiff in error.

Stallo & Kittridge and *Dickson & Murdock*, for defendant in error.

WHITE, J. Two grounds are relied on in this case for reversal: (1) The overruling of the demurrer to the petition; (2) the overruling of the motion of the defendant for a second venire to fill the panel of the jury.

We are of opinion that the demurrer was properly overruled.

The defendant below was a common carrier of passengers, and the plaintiff and his wife were rightfully seated in one of its cars to be carried as passengers, and were ready and willing to pay their fare. Being thus lawfully in the car they were, by the procurement and order of the conductor, forcibly ejected therefrom, and thus received the injuries complained of.

The car was under the control of the conductor, who was the only representative of the defendant with whom the public, desiring to avail themselves of the defendant's business as a public carrier, could deal.

It was the duty of the defendant to carry the plaintiff and his wife; and in performing this duty it acted toward them, in common with other passengers, solely through its representative, the conductor. What the latter did or refused, in respect to the carriage of passengers, is, we think, to be regarded as the act of the defendant. The conductor, by being placed in his position, was invested by the defendant with the implied authority of excluding improper persons from the car. This necessarily included the authority of determining who ought to be admitted and who excluded. *Seymore v. Greenwood*, 7 H. & N. 356.

The master is responsible for the acts of his servant done in the course of his employment; that is, under the express or implied authority of the master. *Little Miami Railroad Co. v. Wetmore*, 19 Ohio, 131.

In dealing with persons as passengers, whether in admitting or excluding them from the cars, or in assigning them places after they have entered, the conductor in charge is acting in the course or within the scope of his employment. When this is the character of the act, the master is responsible for it civilly, even if it be an act of positive malfeasance or misconduct. *Smith's M. & S. s. p. 151; Little Miami Railroad Co. v. Wetmore, supra; Limpus v. London Genl. Omnibus Co., 1 H. & C. 541.*

Where a person is injured by the act of a servant done in the course of his employment, we see no good reason why the motive or intention of the servant should operate to discharge the master from liability. If the nature of the injurious act is such as to make the master liable for its consequences, in the absence of the particular intention, it is not perceived how the presence of such intention can be held to excuse the master.

We do not say that when the nature of the act is such as to render it equivocal, whether the act comes within the scope of the servant's employment or not, the intention with which the act is done is not to be looked to in determining its true character. What we say is, that when it plainly appears the act of the servant was done in the course of his employment, the willfulness or wrongful motive of the servant in doing the act will not excuse the master.

Such, in our opinion, is the character of the case made in the petition.

The judgment was reversed and the case remanded on the second grounds.

NOTE.—See *Higgins v. The Watervliet Turnpike, etc., Co.*, 7 Am. R. 203 and note, also *Isaac v. The Third Avenue R. R. Co.*, id. 418, and note, and *Bryant v. Eick*, post, and note, wherein the authorities on the question are discussed.—RER.

McGOVERN, plaintiff in error, v. KNOX.

(21 Ohio St. 547.)

Husband and wife. Equitable estate — estoppel.

Real estate, intended for the wife, was conveyed to the husband, the wife paying part of the consideration. *Held*, that an equitable estate *pro tanto* vested in the wife; and that she was not estopped from asserting her estate against one seeking to subject it to the execution of a judgment on a loan made to

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her husband after the conveyance, on his personal credit, the loan not being induced or influenced by her conduct.

ACTION against Matthew McGovern and wife, and several lien holders, to subject certain real estate on Laurel street, in Cincinnati, to the payment of a judgment against Matthew McGovern, held by Frances Knox, plaintiff, as assignee. The property in question was purchased by Mr. McGovern at the instance of his wife, and the deed was made out in his name, without the knowledge of the wife. The contract price was \$4,000; and Mrs. McGovern paid \$2,000. Subsequently, William Knox became indorser for Matthew McGovern on a promissory note to P. C. Brown, for a personal loan of \$500. Brown afterward took judgment on the note, and assigned the judgment to the present plaintiff.

Judgment was entered for Frances Knox at special term of the superior court, and affirmed, on error, at general term, charging the real estate in question with the payment of the plaintiff's claim.

To reverse this judgment, the present petition in error was filed.

Kebler & Whitman, for plaintiffs in error, submitted the dissenting opinion of Judge Taft, in the court below, maintaining that the facts of the case do not estop Mrs. McGovern from setting up her ownership against the judgment creditors of her husband, and cited *Robinson v. Bates*, 3 Metc. 42; 2 Smith's Lead. Cas. 755; *Lowell v. Daniels*, 2 Gray, 161; *Pickard v. Sears*, 6 Ad. & El. 474; *Freeman v. Cooke*, 2 Exch. 654; *McAfferty v. Conover's Lessee*, 7 Ohio St. 105; *McClure v. Douthitt*, 6 Penn. 414; *Palmer v. Cross*, 1 Smedes & Marsh. 48; *Wilks v. Fitzpatrick*, 1 Humph. 55; *Drake v. Glover*, 30 Ala. 382; *Gatling v. Rodman*, 6 Ind. 292.

Yaple & Healy, for defendant in error, argued that Mrs. McGovern, as against William Knox, who dealt with her husband on the faith that he owned the land, had no title to or interest in it, and is estopped from setting up against Mrs. Knox that she had any interest whatever, and cited *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Hardy v. Van Harlingen*, 7 id. 208; *Bobcock v. Pavey*, 8 id. 270; and submitted, also, the majority opinion of the court below, delivered by Judge STORER, holding that the facts in the record would estop the husband, and that there could be no sufficient reason to make the wife an exception to the rule, and citing *Smiley v. Wright*, 2 Ohio, 506; *Carter v. Longworth et al.*, 4 id. 384; *Reilly*
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v. *Miami Exporting Co.*, 5 id. 333; *McFarland v. Fobigser's Heirs*, 7 id. (pt. 1), 194; *Buckingham et al. v. Smith et al.*, 10 id. 288, 298; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, 357; *Savage v. Forster*, 9 Mod. 35; 1 Fonblanque's Eq. 3, § 4; *Evans v. Bicknell*, 6 Ves. 180; Lord St. Leonard on Vendors (1st Am. ed.) 180; *Vaughan v. Vanderstegen*, 2 Drew. Ch. 165; *Jones v. Kearney*, 1 Drury & War. 167; *Hobday v. Peters*, 28 Beav. 360; 1 Story's Eq. Jur., §§ 384, 389; *Mount v. Morton*, 20 Barb. 131; Roper on Husband and Wife, 220, 221; *Bartlett v. Gillard*, 3 Russ. 152; *Jaques v. M. E. Church*, 17 Johns. 577; *Hardy v. Van Harlingen*, 7 Ohio St. 208; *Glidden et al. v. Taylor et al.*, 16 id. 517.

WEST, J. Two questions are raised on this record:

1. Has Mrs. McGovern an equitable estate in the controverted premises?
2. Is she estopped to assert it against the judgment set up by the defendant in error?

The judgment of the superior court at special term was affirmed at general term by a divided bench. The elaborate opinions delivered by the learned judges, at general term, have been adopted by the opposing counsel respectively, and submitted as their arguments for consideration here. A clear understanding is thereby furnished of the points on which the case turned below.

A subsisting equitable estate in Mrs. McGovern seems to have been conceded, or at least not seriously questioned; and estoppel *in pais* relied on by a majority of the court to bar its assertion. To us the first proposition is of the greater gravity, and presents the only question of real difficulty.

I. If Mrs. McGovern has an estate in the controverted premises, it arises upon a resulting trust. Do the facts disclosed vest in her such estate?

As between strangers, it will be presumed, and as between members of the same family it may be shown, that a conveyance of lands to another than him by whom the consideration, or some part thereof, is, at the time, paid or secured, vests in the latter an equitable estate *pro tanto*, by resulting trust. *Botsford v. Burr*, 2 Johns. Ch. 405; *Wray v. Steele*, 2 Ves. & Beam. 388; *Creed v. Lancaster Rank*, 1 Ohio St. 1. It is sufficient if the payment of the consideration be secured for and on behalf, the *cestui que trust* by the promissory note of a third person. *Morey v. Herrick*, 18 Penn. St. 123; or of

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him to whom the legal title is conveyed. *Lounsbury v. Purdy*, 16 Barb. 376; and 1 Leading Cases in Eq. 276, where the authorities are collected. The foundation of a resulting trust is the payment, or the securing to be paid, by the *cestui que trust*, out of his own means, the consideration of the conveyance, or some part thereof, at its completion.

In the present case, the proof is clear that \$2,000, part of the consideration of the conveyance of the Laurel street property to her husband, has been paid by Mrs. McGovern, out of her separate moneys. It is also clearly shown that the property was originally intended for her, to be paid for from the proceeds of her inheritance. But not being able to raise the cash payment of \$2,000 at the completion of the conveyance, and being under the disability of coverture disqualifying her from binding herself by any form of commercial obligation, the payment was secured, and made a charge upon her separate estate by mortgage, which was the highest and only security binding the same, that she could give, her husband's note being made its basis. To the extent of this \$2,000 charged upon her separate property, the original credit was given to her; whence an equitable estate *pro tanto* at least became vested in her by resulting trust.

Unless she is estopped to assert this estate, the judgment of the superior court must be reversed, thus rendering it unnecessary to consider the question or determine the extent of her interest, resulting from the mortgage of her equitable estate in the purchased premises to secure the deferred installments.

II. Is Mrs. McGovern estopped to assert her estate in this action?

It is the dictate of natural justice that he who, having a right or interest, by his conduct, influences another to act on the faith of its non-existence, or that it will not be asserted, shall not be allowed to afterward maintain it to his prejudice. Out of this just principle has grown the equitable doctrine of estoppel *in pais*, so well stated and strongly approved by Fonblanque in his treatise on Equity, vol. 1, ch. 3, § 4; by Chancellor Kent, in *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; by Lord Maclesfield, in the leading case of *Savage v. Forster*, 9 Mod. 35; and by the other authorities cited in support of the judgment below.

The doctrine has been characterized as one of harshness. But it has its foundation in the solicitude of the law to prevent fraud from consummating its ends, and to promote good faith in the conduct of

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men; its apparent harshness arising from its injudicious application.

Probably no inflexible rule can be laid down defining the several conditions of its application in all cases. One condition, however, is fundamental and essential in every case, which is, that the particular right or interest invoking the protection of the doctrine *must* have been influenced by the conduct, the encouragement, concealment or denial of him who, or with whom one in privity, is sought to be estopped. Only parties and privies are affected by it, or can invoke its interposition.

The non-observance of this fundamental condition doubtless determined the judgment below. The origin of the controversy was a loan of money by Pearson C. Brown to Matthew McGovern. The defendant in error, now asking the application of the doctrine, is the assignee of Brown, standing in privity with him. Her equity is not superior to his. If he could not, neither can she be aided by estoppel.

The original loan by Brown to Matthew McGovern was not made on the faith of title in him; but on the credit of William Knox, his personal indorser. Brown, therefore, did not act, and hence acquired no right, on the faith that Mrs. McGovern had no estate, or that it would not be asserted. In fact, it does not appear that she had any knowledge of the loan; that any act or utterance of her's influenced Brown in making it; or that he was aware of her existence. As to him, then, and hence as to the defendant in error, who is in privity with him, no single condition of estoppel is shown by the record.

It is insisted, however, and the judgment below seems to have resulted from the misapprehension that a case of estoppel is raised in favor of the defendant in error, by the evidence of representations and information, on the faith of which William Knox became indorser. In our opinion, this evidence is incompetent. William Knox is not before the court. His right is not involved. He is not asserting it. The defendant in error is not in privity with, but claims adversely to him. Her title is derived through Brown, not William Knox.

The judgment of the superior court, at general and special term, will be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

BOWLES, appellant, v. LEWIS.

(48 Mo. 32.)

Military authorities — effect of seizure and sale of private property.

A United States provost marshal seized personal property of plaintiff and sold it at public auction. Subsequently plaintiff found a horse, part of the property sold, in the possession of defendant, and brought an action for its recovery. The court ruled that plaintiff must prosecute his remedy, if any, against the government, and that defendant was not liable in this action. *Held* error, and that, in order to protect his title under the sale, the defendant must show that the property was seized and sold in accordance with the usages of war.

ACTION to recover personal property. The opinion states the case.

The appeal is by plaintiff.

Buckner & Gatewood, for appellant, cited *Ex parte Milligan*, 4 Wall. 1; *Wilson v. Crockett*, 43 Mo. 218.

Fagg & Dyer and *Orrick & Emmons*, for respondent, cited *Willman v. Wickerman*, 44 Mo. 484.

BLISS, J. In the fall of 1864, the provost marshal of the district, embracing Montgomery county, seized upon the personal property of the plaintiff, sold the same at public auction, and paid over the proceeds of the sale to the provost marshal general of the State, who approved his proceedings. Subsequently the plaintiff found a horse, part of the property so sold, in the hands of defendant, and brings this action for its recovery. The record simply shows the fact of seizure and sale, and gives no reason whatever for the proceeding. The case was submitted to the court, and the defendant claimed that the action of the military authorities passed the title to the property without regard to the grounds of that action. This view was substantially sustained by the court in finding for the defendant, under the following declaration of law, given on its own motion: "If it has been shown to the satisfaction of the court, sitting as a jury, that the horse in controversy was seized and sold by authority of the United States government during the late civil war, and that the defendant holds under such sale, then the plaintiff must prosecute his remedy, if any he has, against the government, and the defendant is not liable in this action."

This declaration would be ambiguous but by reference to the evidence. It is true that if the property was sold by authority of the government, the title passed; but what did the court mean by the phrase "authority," etc.?

The act of a public officer is not necessarily that of the government he represents, and it is only so when he follows the law. The government can only act through the law. When obeying the law, its agents properly represent it, and in the seizure and sale of property the law transfers the title. But this could not be the sense in which the action of the government was spoken of, for it nowhere appears that the officers who seized this property had any lawful authority for their action, nor is there any attempt to set up such authority. Hence the declaration embodies the startling proposition that whenever, in a state of war, property is seized and sold by a military officer, whether or not the action is warranted by military law or usage, his act is that of the government whose commission he holds, and the double consequence follows that the citizen may be deprived of his property at the mere will of a military officer, and that the government is bound by the acts of such officer without reference to their legality.

In order to protect his title under the sale, the defendant must

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show that the property was sold under some valid condemnation or judgment, or that its seizure and sale was authorized by the usages of war; otherwise the action of the provost marshal was a mere trespass. *Wilson v. Crocket*, 43 Mo. 218; *Wellman v. Wickerman*, 44 id. 485; *Mitchell v. Harmony*, 13 How. 128. To attempt to elaborate so plain a proposition might imply a doubt upon a principle so universally received in all countries where men are governed by law rather than the will of public functionaries. Courts will not permit it to be questioned.

The other judges concurring, the judgment will be reversed and the cause remanded.

STEINES *et al.*, appellants, v. FRANKLIN COUNTY *et al.*

(48 Mo. 107.)

County bonds — bona fide holder — power of legislature.

Where a statute authorizes the issue of county bonds after submitting certain questions to the people of the county to be voted upon, and the bonds are issued by the county, of its own motion, and without submitting the questions to the voters of the county, the bonds are void, even in the hands of *bona fide* holders; but the legislature has power to cure the defect by authorizing the county to take up the old bonds and issue, in lieu thereof, new bonds, which would be valid. (*See note, p. 100.*)

BILL in equity. The opinion states the case.

Crews, Letcher & Laurie, and *Ewing & Holliday*, for appellants.

Sharp & Broadhead, and *James Tausig*, for respondents.

WAGNER, J. This was a petition in the nature of a bill in equity, brought by the appellants, who are citizens and tax payers of Franklin county, asking for a decree declaring a contract and certain orders of their county court void, and requiring a cancellation and delivery of bonds issued under said contract, and for an injunction restraining their payment, sale or transfer, and restraining the

assessment, levy or collection of a tax for the purpose of their payment.

The controversy springs out of a contract made by the county court of Franklin county with Budd & Decker for the macadamizing and bridging of a certain road in that county from the town of Union, the county seat, to the west line of St. Louis county. The bonds received in payment of the work by the contractors were negotiable securities with coupons attached, and were mostly transferred before the institution of this suit.

There is nothing to show that the holders had any notice, or that any knowledge was brought home to them of any bad faith or infirmity in the contract previous to the time the bonds were negotiated and transferred. The persons owning these securities were made parties to this suit, and must be treated as *bona fide* and innocent purchasers. As the bonds were negotiated before maturity, what has been said in the argument as to the bad faith and dishonest conduct of the officers and contractors can have no weight against the defendants, who innocently invested their money, provided the authority to issue the bonds actually existed. The prevailing insanity of the people about running in debt and making expenditures for public improvements, the folly of county officers, and the arrant knavery of contractors and speculators, are considerations which might have application in a proceeding to restrain the issue or negotiation of the bonds, but ought not to be allowed to authorize their repudiation when they have come into the possession of *bona fide* holders. The application on the part of the appellants would have come with a better grace and with more persuasive equity had they filed their bill at the commencement of the work, and not waited till its completion before they moved in the matter. They were citizens of the county, they knew of the contract, they saw the heavy expenditures that were being made, and the amount of improvement as it was executed; and still the proceeding was not instituted till the work was completed, and the bonds in payment were issued and nearly all negotiated. The bill, so far as it asks to enjoin the assessment, levy and collection of a tax for the purpose of paying the bonds, must be disregarded, as it is well settled that a bill in equity will not lie for such a purpose, the party having a complete remedy at law.

The two main questions to consider are, whether the bonds were issued without authority, so as to be absolutely void, and whether,

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if such was the fact, they were rendered valid by subsequent authority and enactment. There were some minor matters presented, but they require no particular notice, as upon the two essential points above indicated the case must be decided.

The contract was originally made and the county court proceeded, under the authority of an act of the legislature concerning roads and highways, approved February 16, 1865. The thirteenth section of the act declares that before any expenditures shall be made by county courts for the purposes contemplated by the act, the county courts may, for the purpose of information, submit the amount of the proposed expenditure to the voters (of the respective counties) at the next special or general election, and if a majority of the voters shall approve of such proposed appropriation, then the court may proceed and improve the roads as herein contemplated. If a majority shall vote against such appropriation, then nothing further shall be done therein within twelve months, and until another vote is taken as before set out, and such new vote shall determine the matters as provided. Sess. Acts 1865, p. 117.

It is admitted that the question was not submitted to the voters of Franklin county, and that no election was had for the purpose of determining the matter. The court proceeded of its own motion, without consulting the people, and entirely ignored this provision of the law. As county courts are only the agents of the county, with no powers except what are granted, defined and limited by law, like all other agents they must pursue their authority and act within the scope of their powers. *Wolcott v. Lawrence County*, 26 Mo. 272; *Ruggles v. Collier*, 43 id. 353.

In the case of *The City and County of St. Louis v. Alexander*, 23 Mo. 483, where the law required the county court to submit to the qualified voters of the county the question of subscribing stock to a railroad, it was decided that it was necessary that the sense of the qualified voters should be taken as to the propriety of the subscription, and that it would be illegal for the court to subscribe without such previous submission. It is contended that it was not imperative with the county court to submit the matter to a vote, but merely discretionary, as the language used is, "may for the purpose of information." But the preceding part of the sentence clearly negatives this construction, for it expressly provides that "before any expenditures shall be made by county courts," etc., "they may, for information, submit the amount proposed to be expended to the

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voters; and if a majority vote against it, then nothing further shall be done within one year." As the tax payers are the persons most deeply interested, it was obviously contemplated that they should be consulted as to the necessity, propriety and utility of the expenditure. It was not intended to vest in the county court unlimited power over the property of the people of the entire county. A similar question to this arose and was decided by this court in the case of *The Leavenworth & Des Moines Railroad Co. v. County Court of Platte county*, 42 Mo. 171. The case depended upon the construction to be given to the act by which the company was chartered. One section in the act of incorporation gave the county court a general power to subscribe stock, but by another section the power was expressly limited and made subject to the provisions of the general railroad law then in force, which provided that the county court "may, for information, cause an election to be held to ascertain the sense of the tax payers" as to such subscription. No such election was directed or held.

In the decision of the case, the court held the following language: "This [the election] was a necessary condition of the power to subscribe. That all the sections of an act are to be construed together is a well-settled rule of construction. The word 'may' in this clause must be interpreted to mean 'shall.' It is a power given to public officers, and concerns the public interest and the rights of third persons, who have a claim *de jure* that the power shall be exercised in this manner, for the sake of justice and the public good." *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 113; *Blake v. Portsmouth & Concord Railroad Co.*, 39 N. H. 435; *Malcolm v. Rogers*, 5 Cow. 193. This principle is founded in justice, and was declared in an early day, that where the rights of third persons are involved, or the public good requires it, the word "may" will always be construed to mean "shall." In an old case the following ruling was had: "Indictment on 14 Char. II, ch. 12, against church-wardens and overseers, for not making a rate to re-imburse the constables. Exception was taken that the statute only puts it in their power to do so by the word 'may,' etc., but does not require the doing of it as a duty, for the omission of which they are punishable. *Sed non allocatur*; for, where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall;' thus 23 Henry VI says the sheriff may take bail; this is construed he shall, for he is compellable so to do." *Rex v. Barlow*,

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2 Salk. 609; S. C., Carth. 293; see, also, *Waterhouse v. Bawds*, Cro. Jac. 134; *Crouther's Case*, Cro. Eliz. 655; 2 Inst. 118; *King v. Inhabitants of Derby*, Skin. 370.

I think, therefore, it is clear, both upon authority and principle, that the court did not act within the scope of its power, or pursue its authority in making the contract and issuing the bonds without submitting the proposition to take the sense of the voters.

But the point is further urged that, even if this be so, still the bonds are valid in the hands of innocent purchasers. It is quite certain that mere irregularities in the steps which led to the issuance of bonds will not affect them in the hands of third persons who purchased without notice, providing the power to issue them actually existed. Recent decisions in some of the States have asserted a contrary doctrine, and have gone far toward impairing the value of these securities, but we are not disposed to follow them. And in New York, where the law required that the subscription could only be made and the bonds issued by obtaining the written assent of a certain number of resident tax payers, and filing it with the county clerk, it has been held as prerequisite to a recovery that the bondholder was bound to prove affirmatively that the written assent of the required number of resident tax payers was, in point of fact, obtained and filed in the county clerk's office, and that the town was not bound by the representation of its officers, upon the face of the bonds, that such assent had been obtained and filed. *Starin v. Town of Genoa*, 23 N. Y. 439; *Gould v. Town of Sterling*, id 456.

But the supreme court of the United States, in a series of adjudications, have established a different principle, and one which we believe is more in consonance with justice and reason. We have heretofore conformed our rulings on this subject with the decisions of the national court, not on account of its paramount authority — for on this question it has none — but because it inculcated an unbending principle of right and a rigorous morality. Whether any of the cases have gone sufficiently far to warrant the holding of these bonds binding and valid is now to be inquired into.

The leading case is *The Commissioners of Knox County v. Aspinwall et al.*, 21 How. 539. The legislature of Indiana passed an act authorizing Knox county to subscribe for stock in the Ohio and Mississippi Railroad Company, on condition that a majority of the voters of the county decided in favor of such subscription at an election to be held for that purpose. An election was held, and a majority

vote was cast for the subscription, and the board of commissioners made the subscription and issued and delivered bonds in payment thereof. These bonds were negotiated, and the holders brought suit to enforce the payment. The suit was resisted, on the ground that there was a want of authority to execute the bonds in question, because there was an omission to comply with the requirement of the statute, in respect to the notices to be given. That the election was held and a majority vote obtained for the subscription was not denied, but it was alleged that the notices of election were irregular and defective.

But, in answer to this, the court decided that where the board subscribed for the stock and issued the bonds, purporting to act in compliance with the statute, it was too late to call in question the existence or regularity of the notices in the suit against them by the holders of the bonds, who were innocent holders, in this collateral way; that, in such a suit, according to the true interpretation of the statute, the board were the proper judges, whether or not a majority of the votes in the county had been cast in favor of the subscription to the stock; and that, as the bonds on their face comported with the law under which they were issued, the purchaser was not bound to look further for evidence of a compliance with the condition to the grant of power. But this judgment must be taken with reference to the facts in the case. In arriving at their conclusion the court say: "The case assumes that the requisite notices were not given at the election, and hence that the vote has not been in conformity with the law. This view would seem to be decisive against the authority on the part of the board to issue the bonds, were it not for a question that underlies it, and that is, who is to determine whether or not an election has been properly held and a majority of the votes of the county cast in favor of the subscription? Is it to be determined by the court in this collateral way, in every suit upon the bond or coupon attached, or by the board of commissioners as a duty imposed on it before making the subscription? The court is of opinion that the question belonged to this board. The act makes it the duty of the sheriff to give the notices of election for the day mentioned, and then declares that, if a majority of the votes shall be given in favor of the subscription, the county board shall subscribe the stock. *The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription, and to have acted*

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without first ascertaining, it would have been a clear violation of duty ; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. This board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests.

"We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached ; but after the authority has been executed, the stock subscribed and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question ; much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way."

In *Bissell et al. v. The City of Jeffersonville*, 24 How. 287, the common council of the city of Jeffersonville, in Indiana, had authority to subscribe for stock in a railroad company, and to issue bonds for such subscription, upon the petition of three-fourths of the legal voters of the city. Under one of these acts the common council determined that three-fourths had so petitioned, and, under a subsequent act, authorizing them to revise the subject, they again came to the same conclusion and issued the bonds. Duly certified copies of the proceedings of the common council were exhibited to the plaintiffs at the time they received the bonds, and upon the bonds themselves it was recited that three-fourths of the legal voters had petitioned for the subscription. The court held that jurisdiction of the subject-matter, on the part of the common council, was made to depend upon the question whether the petitioners whose names were appended constituted three-fourths of the legal voters of the city, and the common council were made by the laws of the tribunal to decide that question ; and, therefore, when the city was sued upon the bonds by innocent holders for value, it was too late to introduce parol testimony to show that the petitioners did not constitute three-fourths of the legal voters of the city.

The doctrine of these cases was re-asserted and enforced in *Moran v. Commissioners of Miami County*, 2 Black. 722. In *Mercer County v. Hackett*, 1 Wall. 83, the facts were these: By act of the assembly, passed in 1852, the legislature of Pennsylvania authorized the com-

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missioners of Mercer county in that State to subscribe to the stock of the Pittsburg & Erie Railroad, which road, if built, would pass through their county and benefit it. The act, however, contained this proviso: "*Provided*, that the subscription shall be made subject to the following restrictions, limitations and conditions, and in no other manner or way whatever, viz.: All such subscriptions shall be made by the county commissioners, and shall be made by them after, and not before, the amount of such subscription shall have been designated, advised and recommended by a grand jury of said county." The grand jury only "recommended that the commissioners of Mercer county subscribe to the capital stock of the Pittsburg & Erie Railroad to such an amount and under such restrictions as may be required by the act of the assembly, by authorizing them to subscribe to an amount not exceeding \$150,000." Under this recommendation, the commissioners subscribed the stock and issued bonds. The bonds declared on their face that the faith, credit and property of the county were solemnly pledged under the authority of certain acts of assembly, and that, in pursuance of said acts, the bonds were signed by the commissioners of the county. An attempt was made to defeat the payment of these bonds, after they were passed to the hands of innocent purchasers, but the court rejected this defense. Mr. Justice GRIER, speaking for the whole bench, said: "They are on their face complete and perfect, exhibiting no defect in form or substance, and the evidence offered is to show that the recitals on the bonds are not true; not that no law exists to authorize their issue, but that the bonds were not made in pursuance of the acts of assembly authorizing them. We have decided, in the case of *Commissioners of Knox County v. Aspinwall*, that where the bonds on their face import a compliance with the law, under which they were issued, the purchaser is not bound to look further. The decision of the board of commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of other parties had attached, but, after the authority had been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question." *Van Hostrup v. Madison City*, 1 Wall. 291; *Meyer v. City of Muscatine*, id. 385. In *Supervisors v. Schenck*, 5 Wall. 772, the suit was brought upon certain bonds of Marshall county, Ill. The statute under which the bonds were issued gave the counties authority to purchase or sub-

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scribe for shares in railroad companies, subject to certain conditions or regulations, one of which was that a majority of the qualified voters of the county must first vote for such subscription or purchase. In 1851 the legislature passed a statute called "the township organization law," which, after its adoption by the counties, transferred certain powers in reference to the counties to a board of supervisors instead of the county court. Among these powers was a right to call an election, for the purpose of ascertaining the sense of the voters, in relation to a subscription for stock. On the 28th day of February, 1853, the county court of Marshall county ordered an election to vote for and against a subscription. The election was held under that order, and a majority of the voters cast their ballots in favor of the subscription. Previous to the 28th day of February, 1853, the county had adopted the township organization statute, and was on that day so organized and acting. The board of supervisors, on the 14th of November, 1854, acting by authority of the election, made the subscription and issued bonds and coupons in payment thereof. The bonds were transferred for value, without any notice of want of authority to execute the same, and for nine years the board of supervisors annually levied and collected the necessary taxes and paid the interest on them. The only defense was that no election had ever been held by order of the board of supervisors. But the court were of the opinion, and so decided, that the levy of the tax and the payment of interest by the proper county authorities validated the bonds in the hands of *bona fide* holders for value, though in their origin they were issued irregularly in virtue of a popular vote, ordered by the county court instead of the board of supervisors, the vote and other proceedings having been in all respects, other than the source of the order, regular.

We will now briefly refer to a few of the decisions rendered by the court in this State, which mainly coincides with the views taken by the supreme court of the United States.

Flagg et al. v. The City of Palmyra, 33 Mo. 440, was an application for a *mandamus* to compel the city council of Palmyra to levy a tax to pay the annual interest on certain bonds which the city had issued to aid in the construction of the Quincy & Palmyra railroad. The enabling act of the legislature, under which a subscription was made, provided that before any such subscription should be made the city council should call an election of the qualified voters of the city, to vote for or against the making of such subscription, for the

number of shares, to be specified in the notice of the election ; said election to be held on the same notice, and the votes received, counted and returned in the same manner as in the case of election of the mayor and councilmen of the city ; and if a majority of the qualified voters, voting at said election, should be in favor of the subscription, the same should be made by the city council, and the stock so subscribed for should be under the control of the city council in all respects as stock owned by individuals. In the return to the alternative writ, it was not denied that an election was held, and that a majority voted for the subscription ; but it was stated that no call and notice of an election was given, as required by law, and that the votes were not received, counted and returned by the city council, as required by the act. This return was traversed, and the court below found for the relator. In what the informality or irregularity in the proceedings consisted the report of the case does not inform us. But the vote which gave the city council jurisdiction is conceded. The judgment of the circuit court was affirmed, and the judge, in delivering the opinion of this court, said : " In this case, if the bonds have been issued by the city of Palmyra in apparent compliance with the law, and themselves give us no evidence of a want of performance of the prerequisites to their issuance, and no actual notice of any such defect is traced to the bondholders, we will not hold the bondholders to be affected by a failure of the officers of the city of Palmyra to perform all that was by the law required of them, in anticipation of and preparation for the issuing of these bonds. Being issued, in apparent conformity to the law, the public (any of whom might acquire the bonds) is entitled to view them as issued in actual conformity to the law, and to suppose that all the acts required of the people and officers of the city of Palmyra, in reference to the bonds, have been duly performed."

This language is exceedingly broad ; and if it is construed as applicable only to the facts in the case, it is sustained by numerous cases. But if it is intended to assert that a court or a city council, who have power under certain circumstances to make contracts and issue bonds, may disregard these circumstances or conditions entirely, and then issue bonds purporting to be in pursuance of authority which will be binding, and against which no defense can be made, we dissent from it.

In *The Hannibal & St. Joseph R. R. Co. v. Marion County*, 36 Mo. 294, we held that where a county, acting under authority it supposed

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to be valid, subscribed to the stock of a railroad company in good faith, issued its coupon notes in payment of such subscription, and for a series of years voted the stock and paid its coupons; and such notes passed into the hands of innocent and *bona fide* purchasers, it was estopped from asserting that such notes were illegally issued. And to the same purport, see *Barrett v. County Court of Schuyler County*, 44 Mo. 197.

The language used in the cases that, where the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further, must be taken and used with respect to the facts in those cases. By an examination it will be seen that on every one of them the qualified voters had voted to confer the authority, and that some mere irregularities had existed as to the manner of giving the notices or casting up the vote. These irregularities could not be expected, nor were they necessary to be known to the purchasers. The only matter in which they were concerned was to know whether the power to issue the bonds existed. The taking and obtaining the majority vote in this case was the prerequisite—the essential thing which gave the investiture of authority and conferred jurisdiction. The court possessed no power except what it derived from law, and that was only to initiate the proceedings by which the power might be called forth. The real authority came from the voters at the polls. If they sanctioned the measures and authorized the expenditure, the court could then proceed and carry out their will, otherwise not. Till the votes were taken and a majority of them were cast in favor of the proposition, the court had no authority over the subject-matter, and their action was a total nullity. A record which imparts absolute verity may always be impeached for want of authority or jurisdiction in the court rendering it; and so may the acts of an agent who has acted without authority, where there has been no express or implied ratification by the principal.

In *Gelpcke v. City of Dubuque*, 1 Wall. 175, Justice SWAYNE says: "When a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any informality in the hands of such a holder than any other commercial paper."

These bonds are placed upon the footing of commercial paper, and

that is giving them the highest characteristics of negotiable securities. But one who takes a negotiable promissory note or bill of exchange, purporting to be made by an agent, is bound to inquire as to the power of the agent. Where the agent is appointed and the power conferred, but the right to exercise the power has been made to depend upon the existence of facts of which the agent may naturally be supposed to be in an especial manner cognizant, the *bona fide* holder is protected because he is presumed to have taken the paper upon the faith of the representation of the agent as to those facts. But the holder has no such protection in regard to the existence of the power itself. It is precisely this principle that underlies all the decisions on this question, giving this species of paper its firmest support. The holder has only to see that the power authorizing the issue of the bonds exists; but where the right to exercise the power depends upon certain facts, he may rely upon the representation as to the existence of those facts, because they are peculiarly within the cognizance of the agent issuing them. Therefore, where the voters have conferred the power by a vote, the requisite number of votes cast and the regularity of the election are all matters within the knowledge of the county courts or city councils, and the purchasers may well rely upon the truth of their representations touching the premises. As no election was ever ordered and no vote taken in this case, the court had no jurisdiction whatever, and acted wholly without authority, and hence the bonds were void.

The next point of inquiry is whether the act of the legislature, approved March 21, 1868, cured the unauthorized action of the county court and validated the new bonds issued. That act contains the following provisions:

"Section 1. In all cases where the county courts have heretofore laid out, surveyed, and commenced the building and have built macadamized or other roads, or have thrown up embankments, built bridges and culverts, or other necessary work, in their respective counties, the county courts are hereby authorized to borrow money on the credit of the county, and to issue the bonds of the county with coupons attached; but said bonds shall not be of a denomination of less than one hundred or more than one thousand dollars, and shall not run exceeding twenty years, nor bear interest at a higher rate than ten (10) per cent for the purpose of paying for the work done and contracted for in their respective counties.

Sec. 2. Said bonds may be made transferable in such manner as

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the county court may direct; and the courts shall be authorized to levy a sufficient amount of revenue annually to pay the accruing interest on bonds authorized by this act; and for that purpose may, if it should be necessary, levy a special tax."

After the adoption of this last act, the county court took up the original bonds and issued others in lieu thereof. These bonds purport upon their face to be issued "under and pursuant to an order of the county court of said county, and by authority of an act of the general assembly of the State of Missouri, approved March 21, 1868, entitled 'An act to authorize county courts to issue bonds for the purpose of paying for the building of bridges and macadamized roads heretofore contracted for and built.'"

If the act imparts the requisite authority to issue the bonds for the purpose contemplated, I have no doubt about the power of the court to make the exchange in the mode pursued. That the act was framed and passed with a view to meet this very case is unquestionable. It is also true that curative and confirmatory acts are generally specific and particular. But in this State it could not be special without violating the constitutional provision prohibiting special enactments. Its generality, therefore, is not an insuperable objection, no other reason against it being shown. That the legislature had the power is, in my opinion, beyond dispute. The case is not distinguishable from *The Hann. & St. Jo. Railroad Co. v. Marion County*, 36 Mo. 294. In that case, a subscription was made by the county court, under an act that was supposed to be invalid, and we held that a subsequent ratification of the subscription by the court, under an act authorizing the same, would make the contract binding although it had been originally void. The act simply confers the right to do a particular thing, and may be construed as an original power.

So it has been recently adjudged that where a debt was contracted by a city, which was void because not authorized by the statutory law of the State, it was made valid by a subsequent statute recognizing the validity of the debt as contracted. *The City v. Lawson*, 9 Wall. 477. This whole subject was recently examined at length by this court in the case of *Barton County v. Walser*, 47 Mo. 189, and it is unnecessary to repeat here the views therein offered. The counties are not full corporations in the absolute and unqualified sense of that term, but mere political subdivisions for governmental purposes; and the county courts act under the direction of the

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statute, in such manner and according to such terms as may be prescribed by the legislature. Such being the case, it was within the undoubted province of the legislature to grant the power and clothe the court with the authority to issue bonds in payment for the work.

The circuit court found for the defendants, and I think its judgment should be affirmed.

Affirmed.

NOTE. — In *Marsh v. Supervisors*, 10 Wall. 676, the board of supervisors of a county were authorized by statute to subscribe to the stock of any railroad, and to pay such subscription in county bonds, provided a majority of the qualified voters of the county should vote for the same. The board of supervisors subscribed stock and issued in payment the county bonds without the required sanction of the voters. The supreme court of the United States held that such bonds were invalid, even in the hands innocent in fact of any knowledge that the law had not been complied with, and that the supervisors by their subsequent action could not ratify the issuing of the bonds.

But mere irregularities in issuing county bonds will not invalidate them in the hands of bona fide holders. *Lynde v. County of Winnebago* (U. S. Sup. Ct.), 7 Albany Law J. 126. See, also, *State v. Saline County*, post. — RKP.

LUNGSTRASS V. GERMAN INSURANCE CO., appellant.

(48 Mo. 201.)

Fire insurance — policy issued to agent.

A fire insurance company issued a policy of insurance on the goods of its agent who, on the day of its receipt, made an entry in his book of accounts with the company of the amount chargeable against him for the premium. He forwarded no letter of acceptance nor any part of the premium, inasmuch as it was not the custom to forward remittances pertaining to his agency until the end of the month. The next day the goods were destroyed by fire, whereupon he immediately announced the loss to the company. *Held*, that the company was liable on the policy.

ACTION on a policy of fire insurance. The opinion states the case.

The appeal is by defendant from a verdict and judgment in favor of plaintiff.

Finkeluburg & Rassieur and Crandall & Linnet, for appellant.

Phillips & Vest, for respondent.

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BLISS, J. The plaintiff holds a policy of insurance issued under the following circumstances: He had been appointed agent of defendant for Sedalia, and, on the 28th of October, in response to applications obtained and forwarded by him, the secretary sent him policies numbered 294, 295 and 296, the first being a policy upon his own goods. The premium charged was two and a half per cent, and being dissatisfied with the rate, the plaintiff sent back his own policy for a reduction. It was reduced to two per cent and returned, and the plaintiff claims that he received it on the sixth of November, and that on the same day he made an entry in his account with the company, recognizing the change of rate and accepting the policy as changed. Early in the morning of the seventh the plaintiff's goods were burned, and on the eighth he telegraphed the fact, claiming the benefit of the policy. The company, by its secretary, at once repudiated it, upon the alleged ground that the premium had not been remitted, but now claim it to have been invalid because no notice of its acceptance was sent to the company.

Counsel for appellant contend that this case comes under the rules governing contracts by correspondence, and that the contract was not consummated.

It is true that no contract can arise from a proposition or offer on one side until it is accepted on the other; until then it remains merely a proposition. And it is also true that this acceptance must be evidenced by some act that binds the party accepting. A man's mental resolution that can be changed is not sufficient; both parties must be bound or neither will be. The usual mode of accepting a proposition made by correspondence is by notice of acceptance, and though it was formerly held that it did not ripen into a contract until receipt of the notice, yet the doctrine now is that the contract is complete when the acceptance is forwarded, without reference to the time of its reception. *Kentucky M. Ins. Co. v. Jenks*, 5 Ind. 96; *Hallock v. Com. Ins. Co.*, 2 Dutch. 280; *Taylor v. M. F. Ins. Co.*, 9 How. 390. But notice is not the only evidence of acceptance. Any appropriate act which accepts the terms as they were intended to be accepted, so as to bind the acceptor, just as clearly evidences the concurrence of the parties — the bringing their minds together — as a formal letter of acceptance. The terms "the nature of the offer, or circumstances under which it is made," or relation of the parties, may indicate another mode; and, if so, its adoption equally binds them.

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The plaintiff, as agent, was to make his returns monthly, and when the fire occurred the time for making his current monthly return had not arrived. The secretary, on his appointment as agent, had given him a book, being "the tariff of rates and general instruction book, for the exclusive use of agents," of a Cincinnati company, saying to him that the company had adopted their rules until some could be printed in its own name. Among them was the following:

"21. Insurance of your own property. If you have property of your own which you desire to have insured * * * please forward us your application fully made out and signed, and if the risk is such as we can take, will make you a policy at this office at a fair rate, and mail it to you promptly. * * You will enter the risk on your abstract and take credit in your next account, current for commission on the premium, as if the policy had been issued by yourself."

There may be some ambiguity in this instruction, but both parties seemed to understand it to mean that, as to all things but the acceptance of the risk, fixing the rate and issuing the policy, the transaction was to be the same as with an outsider through the agent, *i. e.*, as the agent delivers the policy, receives the premiums, and credits the company with them, to be remitted at his next return, so he credits the company with his own premium, to be remitted in like manner. The following letter, in reply to the applications forwarded by him, including his own, No. 294, also shows this understanding:

"Enclosed transmit to you

Pol. 294 \$51 25 \$42 75
" 295 37 35 80 85
" 296 31 25 25 75

For which you are charged with \$99 85"

Here no notice of acceptance and no remittance was required, but plaintiff was charged with the premiums less the commissions, including his own. Had the plaintiff been satisfied with the rate charged him, would any other notice of the acceptance of the policy have been thought of than the entry of the charges to the credit of the company, which was at once made? But he was dissatisfied with his own, and sent it back for abatement. It was returned reduced to two per cent, and, as the plaintiff testifies, received on the 6th of November, and the difference charged back to the company. After the fire, and in response to its announcement, the secretary sends the

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following telegram: "Policy 294 is not in force, as the premium was not paid; see our letter of November 4." No objection is made because notice of acceptance had not been sent, but only because the premium was not remitted; and the letter of November 4, to be hereafter considered, makes the payment of all the premiums at the company's office, as well as that of No. 294, a condition precedent to the taking effect of the policies; and, so far as notice is concerned, aside from such remittance, it negatives the idea that it was expected; and, indeed, the whole record shows that notice of the acceptance of the policy was not contemplated at the time, and was only thought of after this controversy arose.

I assume that, previous to the letter of November 4, it was the understanding that remittances were to be made monthly, for so plaintiff and the secretary testify; and I assume, what seems to have been the clear understanding, that the premiums on the plaintiff's policy were to be credited and remitted like the others. The inquiry then arises whether any thing was done by the plaintiff after the second receipt of the policy, and before the fire, that amounted to an acceptance of its terms and bound him to pay the premium. He exhibits his account with the company, and testifies that every entry was made at its date. We find, under date of October 28, a credit of each of the premiums as in the statement forwarded, and under date of November 6, the day before the fire, an entry of a charge to the company of the difference between the original premium and as reduced to two per cent. This act unequivocally shows that he intended to abide by the policy as last received, and he became thereby bound by its terms; and, had there been no fire, nothing further was to be done until the time for remittance at the end of the current month.

I have alluded to the letter of November 4, which contains the following postscript: "We call to your attention that policies go into effect only when premiums are paid here." There is a conflict of testimony, in regard to the time of its receipt, the plaintiff testifying that it did not come to hand until the eighth, while the company's secretary says that it was mailed at its date, in which case it should have been received on the fifth—an important variance; but we cannot pass upon these questions of fact, and will only consider whether the instructions to the jury conform to our view of the law.

Most of those asked by defendant assume that the policy could not go into effect without express notice of its acceptance, when other

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acts could as well signify acceptance and bind the parties. They were therefore properly rejected.

Instruction No. 3, given on behalf of plaintiff, predicates the validity of the policy upon its having been assented to before the fire, and neither notice nor any other appropriate act signifying assent and binding the insured is required. This instruction was at least defective, and we cannot say that it did not mislead the jury. Express notice of acceptance can only be dispensed with when apparently not contemplated, and some other act of acceptance is equally clear and unequivocal. The record shows conflicting evidence, in regard to facts bearing upon this question, and, for this instruction, I think a new trial should be granted.

Reversed and remanded.

RUTHERFORD, appellant, v. TRACY *et al.*

(48 Mo. 285.)

Deed—variation in description. Estoppel.

In a deed of land, the description by lot should prevail over that by bearings and distances. Where the language conveying premises was: "Lot No. 3, in block 87, in the old town of Hudson, now Macon, beginning at the northeast corner; thence west to the alley, . . . to the beginning," the description actually embracing a less area than lot 3, *held*, that all of lot 3 was conveyed.

If a grantor shows the purchaser of premises the wrong lines, and is cognizant of his acting on that information, and is silent while a house is erected and money expended, he will be deemed to have directly led the purchaser into a line of conduct prejudicial to his interest. Such acts would constitute an estoppel *in pais*.

APPEAL from Macon circuit court.

The opinion states the case.

W. A. Hall, for appellant.

Henry & Williams, for respondents.

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WAGNER, J. The whole merits of this case depend upon two questions: First. What is the true meaning and intent of the granting clause in the deed conveying the property in controversy; and, second. Whether an estoppel could be predicated upon the facts disclosed by the evidence. The action was ejectment for a part of lot 3 in block 87, in the town of Macon; and the defendants, who are in possession, claimed the entire lot by conveyance. The language, conveying the premises, is as follows: "Lot No. 3, in block 87, in the old town of Hudson, now Macon; beginning at the northeast corner; thence west to the alley; thence south eighteen feet; thence east the length of the lot; thence north eighteen feet to the beginning." *

The defendants now contend, and the court so instructed, that this description passed the fee to the whole lot. The old books contain a great deal of refined and technical learning on this subject. They say that if there be two clauses or parts of a deed, repugnant the one to the other, the first part shall be received and the latter rejected, unless there be some special reason to the contrary; but in the case of a will containing two repugnant clauses or parts, the first shall be rejected and the last received. That the first deed and the last will shall operate is an ancient maxim. Plowd. 541; Co. Lit. 112; Shep. Touch. 88. Upon the rules, as laid down in the old authorities, Judge METCALF, in 23 American Jurist, makes some very sensible remarks. "In modern times," he says, "this maxim has very limited operation. A reason to the contrary is almost always found. The rules of construction, now applied in cases of repugnancy, give effect to the whole and every part of a will, deed, or other contract, when that is consistent with the rules of law and the intention of the party; and when this is impossible, the part which is repugnant to the general intention, or to an obvious particular intention, is wholly rejected. Parts which were once regarded as repugnant are now deemed consistent."

Greenleaf, in his edition of Cruise on Real Property, lays down the doctrine that the modern rule is to give effect to the whole and every part of the instrument, whether it be a will or deed, or other contract; to ascertain the general intention, and permit it, if agreeable to law, whether expressed first or last, to overrule the particular; and to transpose the words, whenever it is necessary, in order to carry the general intention plainly manifested into effect. 2 Greenl.

* This description actually embraced a less area than lot 3.

Cr. title, Deed, ch. 12, § 26, note 1, and cases cited. Mr. Washburne declares that when the parts of a deed are found inconsistent with each other, the courts always give effect to every part of the deed if it is possible, consistently with the rules of law. 3 Washb. Real Prop. 343. To the same purpose is the recent decision in this court in the case of *Campbell et al. v. Johnson*, 44 Mo. 247. If there is an explicit and unambiguous grant of a thing, any exception or reservation which is manifestly contradictory will be rejected; but the intention must be sought after and carried out, if consistent with the rules of law. It is, however, well settled that a deed must be construed *ex visceribus*; the nature and quantity of the interest granted are always to be ascertained from the instrument itself, and fixed monuments always control courses and distances. The supreme court of the United States say: That it is a universal rule that whenever natural or permanent objects are embraced in the calls of a patent or survey, these have absolute control, and both course and distance must yield to their influence. *Brown et al. v. Huger*, 21 How. 306.

In *Lodge's Lessee v. Lee*, 6 Cranch, 237, the description was, "all that tract or upper island of land called 'Eden,'" and then it was added, "beginning at a maple tree," and describing the land conveyed by bounds, courses and distances, but so as not to include all the island. The court held that the whole island passed.

In *Keith v. Reynolds*, 3 Greenl. 393, the description was, "a certain tract of land or farm in Winslow, included in the tract which was granted to Esq. Pattee," and afterward there was added a particular description of courses and distances, which did not include the whole farm. It was contended that the particular description should prevail, in preference to the other, which was more general and uncertain; but it was decided that the first description was certain enough, and that it was to be adopted rather than the description by courses and distances, which was more liable to errors and mistakes.

In *Jackson v. Barringer*, 15 Johns. 471, the grant was, "the farm on which J. J. D. now lives," which was bounded on three sides, and "to contain eighty acres in one piece." The farm contained one hundred and forty-nine acres, and the decision was that the whole farm passed. If a farm or tract of land is conveyed by general terms, an exception of any number of acres or any particular lot is not repugnant, but will be valid. A particular resolution

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may well consist with a general grant, and it will create no repugnancy. Did any facts exist in this case to show that the description of the lot by courses and distances was intended at the time to restrict or limit the quantity conveyed to a less area than the whole lot, we should unhesitatingly, in accordance with the liberal rules that have prevailed in modern times, give full force and effect to that intention. But there is nothing to manifest such intent. The granting clause in the deed is: "Lot 3, in block 87, beginning at the north-east corner; thence west to the alley; thence south eighteen feet; thence east the length of the lot; thence north eighteen feet to the beginning." The legal inference or presumption is that the grantor conveyed the whole lot, and attempted to give it a more particular description by bounding it with courses and distances. The designation of the lot by its number must be regarded as the prominent object or monument; and, where there is uncertainty, the monument must prevail over the description by courses and distances. There is nothing to show any reservation whatever, or that it was intended in the conveyance to carve out any piece or parcel of the lot. If A sells to B the farm on which he resides, and then goes on to describe the farm by courses and distances, and there is a mistake or erroneous description, the whole farm will, nevertheless, pass; because, in the case supposed, it was the manifest intention, gathered from the deed itself, to convey the whole farm. Had the grantor (the plaintiff in this case) in his deed used any apt or appropriate words showing that it was not his intention to convey the whole lot, we should give them effect without regard to any mere verbal arrangement or position they might occupy in the deed. But as it is, without overthrowing well-established principles of law, we are not at liberty to construe the deed otherwise than as passing title to the whole lot.

This conclusion is decisive of the whole case, and renders it unnecessary to examine the other point in reference to the law of estoppel. If the grantor showed the purchaser the wrong lines, and was cognizant of his acting on that information, and stood silent while a house was being erected and money expended, he directly led the purchaser into a line of conduct prejudicial to his interest, and should not now be heard in alleging any thing to the contrary. Such acts would constitute an estoppel *in pais*. The facts, however, were for the jury, and we have seen no error in the court's instructions on that question.

Judgment affirmed.

STATE OF MISSOURI *ex rel.* NEAL, plaintiff, v. SALINE COUNTY COURT.

(48 Mo. 390.)

County bonds — irregularities in issue — bona fide holder.

Where county bonds are, by act of the legislature, authorized to be issued upon a popular vote "specifying the amount," and the bonds are issued upon a popular vote which failed to "specify the amount," this circumstance will be deemed an irregularity simply, and not sufficient to render the bonds void in the hands of *bona fide* holders. (*See note, ante, p. 100.*)

PETITION for *mandamus*. The opinion states the case.

Ames Green & T. A. Green, for plaintiff.

T. P. Strother, for defendant.

BLISS, J. In the State, on the relation of the *Lexington & St. Louis R. R. Co. v. Saline County Court*, reported in 45 Mo. 242, an application was made for a *mandamus* compelling defendant to deliver to the relator certain bonds, and to assess taxes to pay the interest upon other bonds that had been delivered. The application was denied, upon the ground that the law authorized the issue of the bonds only upon a vote of the people of the portion of the county interested, "specifying the amount" to be issued; that the vote did not specify the amount, and that the records of the court showed the defect. We did not say what might have been our opinion had the bonds that were issued gone into circulation and been in the hands of innocent holders.

The present relator represents that \$1,200 of those bonds had been actually negotiated by the county in the construction of their road, and have been purchased and are now held by him, and he asks for a *mandamus* to compel the county court to levy a tax to pay the same. The record shows the same state of facts exhibited in the former case, with the addition only of the transfer of the bonds and their purchase by the relator.

The liability of municipal and of *quasi* corporations for the acts of their lawful agents in issuing negotiable bonds, has been con-

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sidered by this court upon various occasions, and the subject was elaborately discussed at our last March term in *Steines v. Franklin County*, ante, p. 87. The doctrines there affirmed have always been recognized by us, and are founded upon the broadest principles of justice. These bonds are treated like negotiable commercial paper, and after they have been transferred in the usual course of business the authority to execute and issue them is almost the only question open to consideration. The question of authority necessarily arises from the fact that they are executed by agents, and we have only to consider what constitutes authority.

The general rule is, that when the statute gives authority to contract a debt upon specified conditions, their performance is necessary to support the authority; and, in a direct proceeding to prevent the consummation of the contract, the substantial performance of every radical condition may be insisted on. But when the law imposes such a condition upon the exercise of the power, as a submission to a vote of the people, and an attempt has been made in good faith to comply with the condition, and it has been supposed by all parties to have been regularly complied with, the bond upon its face showing a compliance, strangers should not be required to look further. This class of bonds are negotiated by delivery; they go into market in distant States or foreign countries; and if the holder were required to show the regularity of all the proceedings, their negotiability would be greatly impaired or altogether destroyed, and the injustice to one who had received them, trusting to the truth of the recitals, would be very great. The purchaser in an eastern market may be satisfied as to the law — that the matter was submitted to the people, and that the county authorities acted upon that submission; but of the regularity of all proceedings he cannot be advised without sending to a distant State and perhaps an obscure county, employing counsel to examine the records and poll-books, and then he may be wrongly advised. The law throws no such burden upon him. He has trusted and he has a right to trust to the decision of the proper authorities, made when the bonds were issued, as to the regularity of the proceedings. Such decision radically differs from a naked usurpation of authority, and, as to strangers who trust to it, ought to bind the county.

Judge NELSON, in the case of *Knox County v. Aspinwall*, 21 How. 545, says: "The purchaser of the bonds had a right to assume that a vote of the county, which was made a condition to the grant of

power, had been obtained from the fact of the subscription by the board to the stock of the railroad company and the issuing of the bonds." So broad a statement was uncalled for in the case then under consideration, and is inconsistent with our holding in *Steiner v. Franklin County*, *supra*, and is also contrary to the decision in *Marsh v. Fulton County*, 10 Wall. 676. If the holder is to assume the vote from the mere issuing of the bonds, then the county would be prohibited from showing that there was no such vote, and county agents would be enabled to commit the grossest frauds by issuing them without any authority whatever; for the real authority comes from the people, and the statute only enables the people to bestow it.

When these proceedings were formerly under review, the application was first for an order upon the county court to issue bonds to the railroad company that had been withheld; and, second, to provide for the payment of those in the hands of the company. These orders were refused because of the irregularity of the submission and vote. In view of such irregularity, it might have been the duty of the county authorities to refuse to proceed further; certainly this court would not compel the consummation of an erroneous proceeding. And so with the company. It was the payee, the whole proceedings were under the eye of its officers, and it was their duty, as representing the principal party in the transaction, to see whether the law had been complied with. The company stood in the relation of the original holder of negotiable paper, who is advised of a want of consideration or other fact that would affect its validity.

In considering the subject, reference was had to the case of *Mercer County v. Pittsburgh & Erie R. R. Co.*, 27 Penn. St. 389, and we are now told that that case was reversed by *Mercer County v. Hackett*, 1 Wall. 83. This is a mistake. The remarks of the judges in the two cases may be inconsistent, but one is not a review of the other, and the points decided are consistent with each other. The former case was similar to the one in whose support it was cited; the bonds had not been negotiated, and, in a direct proceeding, the court enjoined their negotiation in consequence of irregularity in the action of the body who had power to confer the authority. The latter was a suit brought by an innocent holder of some of the bonds which had been negotiated, and the court sustained his claim upon very broad grounds, it is true, yet the actual decision was consistent with the former case, and consistent with our holding in 45 Mo.

In the case at bar we are to consider the question whether the

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submission to the popular vote, as provided by the statute, was so defective as to amount to no submission at all, or whether it was an error or irregularity of which the county authorities should have taken notice, but which — the election having been passed upon and approved by them — should not affect strangers. I am of opinion that, as to those who have advanced their money on the faith of the action of such authorities, the townships interested in the railroad are concluded. A submission was had; a majority voted for the railroad, and there does not appear to have been any actual misunderstanding as to the object of the vote; no fraud is claimed; the county court ignored the irregularity and issued the bonds; a few of them came into the relator's hands for value. Now, in all honesty and fairness, should he suffer from the blunders of the court? Clearly not; but if there is any loss it should fall upon those who authorized the court to act for them, though the authority was more general and indefinite than the law contemplated.

It is said that the record showed the irregularity. This is true, and doubtless the equity of the relator would be stronger had it been otherwise. But, practically, it makes but little difference. Purchasers would ordinarily only inquire whether the law authorized the vote, and whether a vote had been taken. It is very seldom that they inspect the record, or, if they should do so, that they would be able to detect the error. When these bonds were negotiated, it seems not to have been discovered by any one, even by those in charge of the record, and who participated in the proceedings; and it would be altogether wrong to punish the relator for not having found it out.

We are referred by respondent to the case of *Marsh v. Fulton County*, 10 Wall. 676, recently decided in the supreme court of the United States. The opinion is a clear one, and contradicts in effect the *dicta* of the judges in several of the other cases, and places the validity of county bonds upon satisfactory grounds. The law of Illinois authorized counties to subscribe to the capital stock of railroad companies, and pay for the same in county bonds, provided such subscription was previously sanctioned by a majority of the qualified voters of the county. The board of supervisors of Fulton county, answering to our county court, submitted the question to the voters, whether the county should subscribe \$75,000 to the capital stock of the Mississippi & Wabash Railroad Company, and, after the election, ordered the clerk to subscribe the stock and issue the

bonds. Subsequently, the legislature changed the charter of this company, separated the road into three divisions, and authorized the stockholders in each division to elect separate boards, who should each manage its own division. After this separation, the clerk made the subscription to the central division, and the court held that this division was a different corporation from the one to whose stock the board of supervisors, under the authority of the election, had ordered him to subscribe, and that the subscription was not authorized by the vote. It was a case where the people had authorized a subscription to the capital stock of one company, and no authority whatever was given to subscribe to that of another — an absence of authority, and not an irregularity in granting it.

The other judges concurring, a peremptory *mandamus* will issue.

CENTRAL SAVINGS BANK v. SHINE, appellant.

(48 Mo. 456.)

Guaranty — notice of acceptance — ratification.

Defendant wrote to the president of plaintiff bank, "I will thank you to submit to your board that if they will lend O'Neil & Co. \$15,000, I shall hold myself responsible for that amount, and will leave with you, as collateral security, the note and mortgage of Isaac Walker, which is at present in your vault for a like sum." *Held*, a guaranty, and that defendant was entitled to notice of acceptance thereof; but if, after the loan was made, defendant had information thereof, and with full knowledge approved of what plaintiff had done in the premises, and assented thereto, this would amount to a ratification, and he would be bound thereby.

ACTION on a guaranty. The opinion states the case.

T. T. Gantt and *S. Reber*, for appellant.

Sharp & Broadhead and *I. R. Lackland*, for respondent, contended that no notice of acceptance was necessary, and cited *Powers v. Bumcratz*, 12 Ohio St. 273; *Paige v. Parker*, 8 Gray, 211; *Maynard v. Morse*, 36 Vt. 617; *Kirby v. Studebaker*, 15 Ind. 45; *McNaughton v. Conkling*, 9 Wis. 316; *Noyes v. Nichols*, 28 Vt.

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160, 175; *Grant v. Hotchkiss*, 26 Barb. 63; *Bright v. McKnight*, 1 Sneed (Tenn.), 158; *Van Rensselaer v. Miller*, Lalor's Sup. to Hill & Denio, 237; *Yancey v. Appleton*, 3 Sneed, 82; *Woodstock Bank v. Downer*, 27 Vt. 482; *Farmers' & Mech. Bank v. Kercheval*, 2 Mich. 504; *Union Bank v. Coster's Ex'rs*, 3 N. Y. 203; *Watson's Ex'rs v. McLaren*, 19 Wend. 557; *McLaren v. Watson's Ex'rs*, 26 id. 425; *Curtis v. Brown*, 2 Barb. 51; *Beckwith v. Angell*, 6 Conn. 315; *Mathews v. Chrisman*, 12 Sme. & M. 595; *Springs v. Williams*, 7 Ired. 384; *Griggs v. Voorhies*, 7 Blackf. 562; *Butler v. Wright*, 20 Johns. 367; *Breed v. Hillhouse*, 7 Conn. 523; *Williams v. Granger*, 4 Day, 444; *Read v. Cutts*, 7 Greenl. 186; *Train v. Jones*, 11 Vt. 444; *Smith v. Ide*, 3 id. 301; *Cochran v. Dawson*, 1 Miles, 276; *Carson v. Jones*, 1 McMul. 76; *Bushnell v. Church*, 15 Conn. 406; *Smith v. Dann*, 6 Hill, 543; *Whitney v. Groot*, 24 Wend. 82.

WAGNER, J. This cause was tried on a second amended petition, in which the plaintiff states as its cause of action that Peter O'Neil and Francis Doyle were partners under the name of O'Neil & Co., and that, on the 13th of March, 1868, Joseph O'Neil being president of the plaintiff, the defendant wrote to him on that day from Ireland, as follows:

"Hearing from P. O'Neil and Mr. Doyle that they could use advantageously some additional cash over and above the amount already had of your bank, and being desirous to promote their interests and enable them to carry on their business efficiently, I will thank you to submit to your board that, if they will lend O'Neil & Co. \$15,000 I shall hold myself responsible for that amount, and will leave with you, as collateral security, the note and mortgage of Isaac Walker, which is at present in your vault, for a like sum (say \$15,000). If the Central cannot conveniently make this advance, I will feel obliged to assist them in procuring it elsewhere."

The petition also states that this paper was delivered to the said president on the 30th day of March, 1868, by him on the same day laid before the board of directors and by them accepted; that, by this writing, defendant promised the plaintiff that if it would loan to O'Neil & Co. \$15,000, he (defendant) would be responsible for that amount; that thereupon, "on the faith thereof, plaintiff lent to O'Neil & Co., in the ordinary and usual manner of such loans, \$15,000, of which defendant afterward had due notice; that of this sum \$10,000 was lent on the 30th of March, 1868, for sixty days,

and the balance on the 9th of April, 1868, for sixty days ; of all of which the defendant afterward had full knowledge, and agreed and assented thereto and approved thereof."

The answer admitted the writing set out in the plaintiff's petition, but denied that the plaintiff at any time gave to the defendant notice of the acceptance of the proposal, or that the proposal was accepted ; denied, further, that plaintiff made to O'Neil & Doyle any loans or advances on the faith of the writing as stated and set forth, or that he had any notice of them from any source, prior to the commencement of this suit, or that he at any time assented to or approved the same.

To this answer there was a replication, which simply denied that defendant made a proposal in writing to guaranty plaintiff, in case it would make any loan to O'Neil & Doyle, and that the only writing or contract made by the defendant, relating to the loan, was the agreement mentioned in the petition. The cause was tried by the court sitting as a jury, and the verdict and judgment were rendered for the plaintiff.

Whether the loans were made, and in what manner, were questions of fact, and the verdict and finding of the court below in that regard is conclusive here. So far as refusing instructions asked for the defendant is concerned, we see no ground for interference. Those already given at his instance covered the material points in the case and were sufficiently favorable.

The second instruction given for the plaintiff is, I think, unobjectionable. If, after the loan was made, defendant had information thereof, and with full knowledge approved of what the plaintiff had done in the premises and assented thereto, this would amount to a ratification, and he would be bound thereby. But, under the pleading, the main issue presented is as to the real character of the writing addressed by the defendant to the plaintiff. The view of the plaintiff is that it is an original, primary undertaking — an absolute promise, binding the defendant, without any notice of acceptance. On the other hand, the defendant contends that it is nothing more than a guaranty, and that, to impose any obligation on the defendant, notice of acceptance was indispensably necessary.

The first and third instructions given by the court for the plaintiff proceed upon the theory that the writing was an original promise, and so treat it, and declare that if the plaintiff loaned the sum to O'Neil & Co., in pursuance of the writing, then it was entitled to

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recover. The instructions wholly dispense with any notice of acceptance to be given to the defendant, and hold the writing to be a binding contract as soon as acted upon by the plaintiff, whether the defendant was ever apprised of that fact or not.

There is a marked difference between an overture or proposition to guaranty and a simple contract of suretyship. The one is a contingent liability, the other is an actual undertaking. The surety is bound with his principal as an original promisor; he is a joint debtor with his principal from the very inception of the agreement, and his obligation continues until full payment is made. An indulgence by the creditor will not absolve him, for his liability is absolute, and he is bound to know of his principal's default. But the contract of a guarantor is his separate, independent contract. It is not a joint engagement with the principal to do a thing. It is in the nature of a warranty that some one else shall do a certain thing or act, and the guarantor is responsible only for the default or failure of his principal. A surety, being a joint contractor, may be sued with his principal; a guarantor cannot be.

The great weight of authorities, including the decisions in this State, establish the proposition that, as the original contract with the principal is not the contract of the guarantor, the creditor is bound to give him notice if he intends to hold him responsible. The counsel for the plaintiff have cited cases to show that no notice is necessary, and that the guarantor is bound whenever the creditor receives his proposition and acts on it; but the law of this State is settled otherwise. That the paper, addressed by the defendant to the plaintiff, was simply an overture or proposition, instead of a direct or absolute undertaking, seems to be sufficiently plain. He says, in substance, that hearing that O'Neil & Co. could use some additional cash, over and above the amount already had of the plaintiff, he would thank the president of the plaintiff to submit to the board if they would lend the firm \$15,000, and he would hold himself responsible for that amount; but, if the plaintiff could not conveniently make the advance, he should feel obliged to procure it elsewhere. This was nothing but the submission of a proposition. The defendant did not know whether it would be accepted or not, and until he was notified of its acceptance he obviously could not tell any thing about the nature or certainty of its liability. This, it appears to me, is the fair and correct interpretation of the instrument; and the decisions in this State and in other courts, which we

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have followed, have so construed similar writings, and held that notice of acceptance was necessary to fix the responsibility of the guarantor.

In the case of *Smith v. Anthony*, 5 Mo. 504, Smith addressed to Anthony the following letter :

"COL. WM. ANTHONY: Dear Sir — Wm. Mitchell, Jr. will probably call on you to purchase your horse; and, should you conclude to sell, you can do so. Take his note, and I will be responsible for the payment on his return.

Respectfully,

ZENAS SMITH."

Anthony sold Mitchell his horse, and Mitchell took him to Alabama, and returned; and, failing to make payment, suit was brought against Smith, and it was held that before Anthony could recover he must prove that he gave Smith notice that he had sold on the faith of the guaranty, and that he looked to him for payment.

In *Rankin v. Childs*, 9 Mo. 676, McCourtney applied to Rankin to purchase lumber for building a ferry-boat. Rankin refused to credit him without security. McCourtney mentioned the name of Childs as security, and he was accepted as sufficient. A few days after McCourtney presented a bill of the lumber in Childs' handwriting, at the foot of which was written :

"Messrs. Rankin will furnish the above bill as soon possible, and I will order what more I may want for my boat in a short time.

JAMES MCCOURTNEY."

"I hereby guaranty the payment of the above bill. January 29, 1842.

WM. CHILDS."

It was in evidence that the lumber was delivered, and that, while the boat was being built, Childs was frequently present as a visitor but took no part in the matter. In an action against Childs, it was held that his contract was not a direct promise but a mere guaranty, and, to hold him liable, notice should have been given of the acceptance of the guaranty.

In *Douglass v. Reynolds*, 7 Pet. 113, a letter was addressed by the defendant to the plaintiff in the following words:

"Gentlemen — Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by accept-

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ance or indorsement of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding \$8,000, should the said Chester Haring fail to do so."

It was held that this was a guaranty, and that, to hold the guarantors liable, they were entitled to notice of its acceptance.

This is now and has long been the firmly established doctrine in the supreme court of the United States. *Reynolds v. Douglass*, 12 Pet. 497; *Russell v. Clark*, 7 Cranch, 69; *Edmondston v. Drake*, 5 Pet. 624; *Lee v. Dick*, 10 id. 482.

In Maine, the following instrument was construed in the same way:

"Messrs. W. & G. Tuckerman: Gentlemen — For the bill of goods which Mr. Charles B. Prescott bought of you on the 6th inst., I hold myself responsible to you for payment agreeably to the contract made with him; and I will hold myself responsible for any goods which you may sell him, provided the amount does not exceed at any time \$500." This was decided to be a guaranty, and as the plaintiff had not given notice of its acceptance in the first instance, nor of the delivery of the goods under it subsequently, he could not succeed in his action. *Tuckerman v. French*, 7 Me. 115. A similar decision was made in the case of *Bradley v. Cary*, 8 id. 234.

The question was decided in the same way, on essentially the same state of facts, in *Craft v. Isham*, 13 Conn. 28; *Oakes v. Weller*, 13 Vt. 106; S. C., 16 id. 63; *Lowry v. Adams*, 22 id. 166; *Babcock v. Bryant*, 12 Pick. 133; *Mussey v. Rayner*, 22 id. 223. In all these cases, the courts hold that notice of acceptance is an essential element, without which a guaranty of future advances cannot rise higher than a mere proposal or offer, nor ascend to the rank of a binding agreement.

Mr. Parsons sums up the rule, as deduced and extracted from the weight of authority, that where there is a guaranty for future operations, perhaps for one of uncertain amount, and offered by letter, there should then be a distinct notice of acceptance, and also a notice of the amount advanced upon the guaranty, unless that amount be the same that is specified in the guaranty itself. 2 Para. Cont. (5th ed.) 13.

The reason which underlies the principle of notice is that the guarantor may know distinctly his liability, and have the means of arranging his relations with the party in whose favor the guaranty

is given, and take from him security or indemnity. While New York and some few of the other States have decided that notice of acceptance is unnecessary to bind the guarantor, still the contrary doctrine is ruled in our own courts and the national courts, and a large majority of the courts of other States.

Messrs. Hare & Wallace, in their edition of *Leading Cases*, say, that, notwithstanding the objections which may be made to the doctrine which makes notice essential to complete the obligation of prospective and contingent guaranties, it has been transplanted from the courts of the United States into many of the State tribunals, and is now well-settled law in New England, Pennsylvania, Ohio, Missouri, Kentucky, Alabama, and some other parts of the Union. 2 Am. Lead. Cas. (4th ed.) 73.

It was formerly held that notice of an intention to accept and act under the guaranty was an obligation of the commercial rather than the common law, and that it must be given immediately, or, at all events, without unnecessary delay. But the cases of *Douglass v. Reynolds*, *supra*, and *The Louisville Manuf. Co. v. Welch*, 10 How. 461, are limited to a declaration that notice must be given within a seasonable or reasonable time after what is called "acceptance." And the latter decision establishes not only that a reasonable notice of what is done under the guaranty will be sufficient, but also that no delay in giving it will be a bar to the action, unless it is productive of some injury to the guarantor.

The better opinion, I am inclined to think, is that a general averment of notice is sufficient; and the question whether it be reasonable, under all the circumstances of the case, is one of evidence which should be left to the jury under proper instructions from the court. *Lawrence v. McCalmont*, 2 How. 426; *Louisville Manuf. Co. v. Welch*, *supra*; *Williams v. Staton*, 5 Sm. & M. 347; *Walker v. Forbes*, 25 Ala. 139.

For the error of the court, in giving the first and third instructions for the plaintiff, the judgment must be reversed and the cause remanded. The other judges concur.

Shine having died since the submission of this cause, the clerk will enter up the judgment as of the last term *nunc pro tunc*.

STATE OF MISSOURI *ex rel.* JUDGE v. GATZWEILER, appellants.

(49 Mo. 17.)

Constitutional law — payment of money under military orders. Statute of limitations.

A sheriff paid the surplus of a sale on execution, to another than the person entitled thereto, by order of the military authorities in Missouri. In an action on the sheriff's bond, *held*, that the section of the State constitution, providing that no person should be prosecuted for any act done in pursuance of military authority, was void, as impairing the obligation of contracts, in so far as it applied to acts done in violation of the sheriff's bond, but that, as the action was not commenced until after the lapse of two years from the time when the return showing the sale was made, it was barred by the statute of limitations, as enacted by congress in 12 Statute at Large, 757, which was applicable alike to causes in the federal and in the State courts.

ACTION on a sheriff's bond. The opinion states the case.

T. T. Bruere, for appellants.

E. A. Lewis and *H. C. Lackland*, for respondent.

WAGNER, J. This was an action on the official bond of defendant, as sheriff of St. Charles county. The petition averred that an execution was placed in his hands against the plaintiff from the St. Louis circuit court, on a judgment rendered May 5, 1864, for the sum of \$15,000, with interest and costs; that, upon a sale of the plaintiff's property by the defendant, there remained in his hands the sum of \$5,695.40, after satisfaction of the execution, which he failed and refused to pay over to plaintiff, on his demand, as required by law. Judgment was therefore asked for the penalty of the bond, with an assessment of damages, etc.

Defendant's answer admitted the execution of the bond sued on. It also admitted the execution sale, and receipt of the proceeds, as stated in the petition, but set up as a special defense that he (defendant) was ready and willing to pay over the alleged surplus to plaintiff at the proper time, but was restrained and prevented from doing so by orders from the provost-marshal general of the department of Missouri, who was vested with military authority by the government of

the United States over the State of Missouri; that, by order of said provost-marshal, he was compelled to pay over the said surplus to one Arnold Krekel, in part satisfaction of a fine of \$10,000, which had been adjudged against the plaintiff by a military commission before whom he was tried.

Defendant, therefore, pleaded section 4 of article 11 of the State constitution, and the convention ordinance of March 17, 1865, in bar of the suit. He further pleaded and relied on section 7 of an act of congress, approved March 3, 1863, providing a limitation, as therein stated, in certain cases. It was also set up and pleaded that the defendant was compelled, by overpowering force, and under threats to his personal liberty, to pay the said money over to Krekel, as before alleged.

To all of the above part of the answer, the plaintiff demurred, on the ground that it constituted no defense to the action. The demurrer was sustained by the court, and the defendant excepted. The trial then proceeded on the other issues raised by the answer and reply, involving mainly the fact or sufficiency of the plaintiff's demand before commencing this action, and judgment was finally given for the plaintiff.

Upon the part of the defendant it is insisted that the constitutional provision, set up in the answer as a bar, affords a complete defense, and amounts to a full protection for the defendant, while the plaintiff's counsel take the ground that the case is not within the terms of the section of the constitution relied on, and therefore is unavailing for the purposes for which it is pleaded.

The section in the constitution referred to is as follows: "No person shall be prosecuted in any civil action or criminal proceeding for or on account of any act by him done, performed or executed, after the first day of January, 1861, by virtue of military authority vested in him by the government of the United States, or that of this State, to do such act, or in pursuance of orders received by him from any person vested with such authority; and if any action or proceeding shall have heretofore been, or shall be hereafter, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof." Const., art. 11, § 4.

This provision was before this court in the case of *Drehman v. Stifel*, 41 Mo. 184, and it was there held that it did not conflict with the constitution of the United States; that it was intended as an act of indemnity, oblivion and pardon; of indemnity as far as it

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affected civil actions, and oblivion as it affected criminal proceedings, and that it was not in opposition to the bill of rights.

The constitution of the United States does not prohibit a State from enacting retrospective laws or ordinances of a civil nature, which take away a right of action, or divest rights invested in an individual, if these laws do not impair the obligation of a contract nor divest settled rights of property. *Drehman v. Stifel* was taken by appeal to the supreme court of the United States, and the decision of this court was sustained throughout, but it was intimated, in the concluding paragraph of the opinion, that the case might be different if, by giving effect to the constitutional provision, the party was precluded from asserting a title and enforcing a right.

The objection is raised on behalf of the plaintiff that the defendant is in no situation to take advantage of the constitutional immunity, because it is not shown that he was in the military service, nor that the court-martial that passed sentence on the plaintiff had jurisdiction of the case they attempted to try. But if the defendant is required to show the legality of the military court and the righteousness of the authority of the orders issued by the provost-marshal general, then the constitution simply amounts to no protection at all; for without this constitutional provision, if it could be shown that the act was justified or authorized by competent and lawful authority, then certainly no action would lie.

As to defendant's being a private citizen, no distinction is drawn. The section uses the broad and comprehensive language, "no person shall be prosecuted in any civil action," etc. It is well known, and the framers of the constitution were aware of the fact, that in the violent struggle that was raging in Missouri during the civil war, and especially after the proclamation of martial law, the military arm was accustomed to avail itself of the service of civilians, and often issued orders for them to execute. They acted in obedience to the military power, and are as much within the meaning of the constitution as if they had been actually mustered in the service.

The averment in this answer is sufficient to bring defendant's case within the constitution. It states that he acted in accordance with orders from the provost-marshal general of the department of Missouri, who was vested with military authority by the government of the United States over the State of Missouri. The parties who were engaged in the conflict at that time did not stop to argue about

technicalities, nor scrutinize very closely whether orders were in strict conformity with law.

These facts were well-known, and it was intended that the actors should have indemnity and repose after the struggle was ended and peace restored. The case of *Clark v. Dick*, in the United States circuit court for the district of Missouri (9 Am. Law Reg. N. S. 739), is in point. The action was originally commenced in the State court and afterward removed to the circuit court. It was trespass, alleged to have been committed in the city of St. Louis, in January, 1862. The defendant was one of a committee who revised compulsory assessments or contributions made against different individuals, the plaintiff being one, by order of the general of the army in command of the department of this State.

So far as the record shows, the defendant was at that time a private citizen, and among other pleas he set up the section alluded to in the State constitution. The court decided that the facts pleaded brought the case within the above-mentioned section of the constitution of this State, under which they were a good defense; that section 4, article 11, which, in substance, exempts persons from liability for acts done during the recent civil war by virtue of military authority vested in them by the government of the United States, or in pursuance of an order received from any person vested with such authority, is valid, and protects from prosecution or action all who can show for their acts the authorization of a military officer acting under the commander-in-chief of the army of the United States.

Judge MILLER delivered the opinion of the court, in which he said: "The defendant thus acted in pursuance of orders from one vessel with full military authority, and unless we are to go into the question whether such authority can possibly exist in this country, we must concede that the case is one intended to be provided for by this section. If the defendant is required to show that the authority of the military commander was a rightful and legal authority in the particular matter in question, then the provision in the Missouri constitution is useless. For it must be conceded in all courts that an act justified by lawful and competent authority in the particular case cannot be the foundation of an action. The clause we are considering was not intended for such a case. It was not needed. But the framers of that instrument were aware that many acts of violence had been done by the military and by those subject to military orders, for which it might be difficult to find legal and technical

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justification, but which were thought to be necessary and proper to maintain the national supremacy. They therefore intended to provide for those cases. And while they did not pretend to give protection to lawless violence, committed by persons without orders from any competent authority or any recognized military officers, they did intend to shield from prosecution all who could show for their acts the authorization of a military officer, acting under the commander-in-chief of the army of the United States. The wisdom of this ordinance has lost none of its force by the lapse of time. As a provision for the repose and quiet of the community it could nowhere be more useful than in Missouri."

I think, therefore, that the defendant stands in an attitude to avail himself of the benefits of the constitutional clause, provided the order did not impair the obligation of a contract. On this question my mind is decidedly in favor of the plaintiff.

The defendant's bond was conditioned to discharge the duties of the office of sheriff according to law. It is well established that a public officer, who is required to give bond for the performance of his duties, and the proper payment of moneys that may come into his hands as such officer, is not a mere bailee of the money, exonerated by the exercise of ordinary care and diligence. His liability is fixed by his bond, and no parting with the money, or loss either by theft, robbery or otherwise, will release him from his obligation to make payment. *United States v. Prescott*, 3 How. 578; *Muzzy v. Shattuck*, 1 Denio, 233; *Hancock v. Hazzard*, 12 Cush. 112; *Commonwealth v. Comly*, 3 Penn. St. 372; *State v. Harper*, 6 Ohio, 607; *Hulbert v. The State*, 22 Ind. 125. The duty of the sheriff is to pay over money coming into his hands to those legally entitled thereto, and his bond is the contract that he will not fail upon any account to do this act.

In my opinion this is a contract within the meaning of the constitution of the United States, which the States are prohibited to impair, and any law or ordinance of a State which seeks to release the officer from his obligation should be treated as a nullity.

This brings us to the last question in the case, and that is, the statute of limitations passed by congress (12 Stat. at Large, 757), and which is pleaded as a defense. The seventh section of the act provides "that no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed or act omitted to be done at any time

during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the president of the United States, or by or under any act of congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass or wrong may have been done or committed, or act may have been omitted to be done.

The objection made to this plea is, that it is inapplicable to a case originated and tried in a State court, and that congress has no power to pass a statute of limitations binding on the State courts.

In the case of *Mayor of Nashville v. Cooper*, 6 Wall. 247, the question was fully considered, and it was fully established that congress had the constitutional right to provide for the trial of this class of cases in the national courts. Judge MILLER, in speaking on this point in *Clark v. Dick*, *supra*, declares that if congress has the right to determine in what courts such questions must be tried, it must necessarily have the power to regulate the remedy, including the right to prescribe the time within which the suit may be brought. He further says: "Nor is the objection sound that in such cases the action, if tried in the State courts, would be subject to the law of limitations prescribed by the States, while in the federal court a different rule would prevail. For the act of congress, by its terms, applies to all cases of the character described in the statute, and we see no reason to limit its application to the federal courts. If congress has a right to legislate on this subject, it has the right to make that legislation the law of all courts into which such a case may come, and we think they have done this in the statute under consideration."

But the position is further assumed that even admitting that the statute applies, still, under our law, it does not begin to run till demand made; and the record shows that no demand was made for the money by judge till the latter part of the year 1866, or the first of 1867, and this suit was instituted on the 3d day of April, 1867. When the statute of limitations begins to run, so as to bar an action on the bond of the sheriff for failing to account for moneys collected by him, was considered by this court in the recent case of *The State, to use of Winburn et al. v. Minor et al.*, 44 Mo. 373. It was there held that the cause of action did not accrue so as to put in motion the statute of limitations until there had been either a demand of payment by the parties in interest, or until the officer had made a proper return to the court ordering the sale of the property, and

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showing the amount of money realized therefrom. In examining the authorities it was remarked: "In Massachusetts it is held that the cause of action does not accrue till demand of payment is made upon him (the sheriff), and consequently that the statute of limitations only then commences running." *Weston v. Ames*, 10 Metc. 244.

So also in Louisiana and Connecticut, and various other States. *Fuqua, Adm'r v. Young*, 14 La. An. 216; *Church v. Clark*, 1 Root, 303; U. S. Dig. 644, § 209. But in Georgia it is held that the action accrues, and that the statute begins to run in favor of the sheriff from the time the money was received by him on the execution. *Thompson v. Central Bank*, 9 Ga. 413; Angell on Liens, § 142 in note; while in Alabama the holding is that the cause of action accrues and the running of the statute commences, from the time the fact of the collection is made to appear by the return of the execution satisfied. *Governor v. Stonum*, 11 Ala. 679. Much difficulty has been experienced in determining the time of the occurring of the action with reference to the defense of the statute of limitations. The Massachusetts rule may place the subject too much in the control of the creditor, and lead to a frittering away of the protection designed by the statute to be thrown around officers and their sureties, while the Georgia rule goes as far in the opposite direction. The Alabama rule appears to us to be the better one, and as the question is open for adjustment, we are inclined to adopt that rule here.

Now the return in this case showing the sale, the amount of money realized, and the disposition that was made thereof by the officer, was made on the 24th day of September, 1864. From that time the statute commenced running, and as more than two years—the limitation prescribed—was suffered to elapse before this suit was instituted, we think the statute constitutes an effectual bar to its prosecution.

The counsel have referred us to *Pope v. Hays*, 1 Mo. 450, to show that a demand was necessary before the statute would commence running. But that case is not in point. It merely shows that a strict demand is necessary before the plaintiffs will be entitled to the damages given by the statute for detaining the money. The same is now the statute law of this State (Wagn. Stat. 614, § 65), but it has no bearing upon the question as to when the limitation commences as to the principal amount. Wherefore, it is the opinion of the court that the judgment be reversed; the other judges concurring.

Judgment reversed.

MOSS, plaintiff in error, v. PACIFIC RAILROAD.

(49 Mo. 167.)

Master and servant — Injury to servant by fellow-servant — Pleading.

A master is bound to use due care and diligence in the selection and employment of his agents and servants, and for want of such care and diligence he is responsible to all other servants for any damage that may thence arise.

A minor son of plaintiff was killed while in defendant's employ, and she brought action to recover damages. *Held*, that it was not sufficient for plaintiff to allege a failure merely, on defendant's part, to select competent servants, but she should have charged a want of care and diligence in the selection of defendant's servants; also, that the mere allegation that defendant allowed its employees to neglect their duties, and to suffer and cause deceased to be injured, was not sufficient to charge liability on defendant. (See note, p. 128.)

ACTION against a railroad company. The opinion states the case.

H. Flanagan and G. T. White, for plaintiff in error.

J. N. Litton, for defendant in error.

BLISS, J. A minor son of the plaintiff was killed while in defendant's employ, and she brings this action under the act concerning damages, etc. (Gen. Stat. 1865, ch. 147; Wagn. Stat. 519.) The petition contains three counts, but it is unnecessary to consider the first, inasmuch as a motion to make it more definite was affirmed by consent, and the plaintiff, instead of amending, took a voluntary nonsuit as to this count.

The second count alleges, in substance, that it was defendant's duty to employ careful and skillful servants in running its trains; that defendant failed to do this, by reason of which, while aiding in running the train, the plaintiff's minor son, in defendant's employ, was wounded and disabled, and for many hours was exposed to the cold upon the road, through the incompetence and want of care of such servants, and not by his own negligence, from which he died.

The third count substantially charges that plaintiff's minor son, being in the employ of defendant upon a freight train, as one of its servants, was so injured by falling from the train and exposure to the cold as to cause death; that this was caused by defendant's

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allowing its employees to neglect their duties, and to suffer and cause deceased to be thrown from the train, by which he was injured and suffered to remain in the cold a long time, when he could have been removed, and not by his own fault, etc.

No objection was made to the statement of the same cause of action in different counts, but a demurrer was sustained as to the second and third, and judgment entered upon the demurrer, to reverse which the plaintiff has sued out his writ of error.

The pleader has attempted to base these counts upon the third section of the act, which provides that a cause of action which arises from personal injuries shall survive, notwithstanding the death of the injured party, if it be caused by the injury. We have then only to inquire whether these counts would show a liability to the plaintiff's son at common law, for the pleader does not attempt to bring the defendant within the liability created by the second section of the statute.

That the master is not liable to one of his own servants for the negligence of other servants is conceded. But the pleader attempts, in the second count, to charge negligence in their employment. Had he done so, the pleading would have been good, for the master is under obligation to use due care and diligence in the selection and employment of his agents and servants, and for want of such care, is responsible to all other servants for any damage that may thence arise. *Harper v. Ind. & St. Louis Railroad Co.*, 47 Mo. 567. In such case, the responsibility is not for the negligence merely of his servants, but for his own. This count, however, fails to make any such charge. The plaintiff alleges that it was defendant's duty to employ careful and skillful servants, etc., but that it failed to do so, but he does not charge any want of care and diligence in the performance of this duty.

Railroad companies and other carriers of passengers, as to such passengers, are held to insure the care and diligence of their servants. As between them and the carrier, there is a contract which is violated by any want of care on the part of its employees, and a railroad company is just as responsible, if its officers have taken extraordinary pains in their selection, as though wholly reckless in that regard. But, as to its servants, there is no such contract, and hence there is no guaranty of their care and diligence toward each other. The company is only liable, as all are liable, for its own want of care.

The pleader evades the real question, and tenders an immaterial issue. It is the duty of defendant's officers to employ proper servants, but the duty is not an absolute one. If they make careful inquiry into the habits and competency of the men employed, and upon such inquiry believe, and have reason to believe, them sober, competent and careful, they can do no more; they have honestly and faithfully endeavored to do their duty, and there is no contract for any thing more. Hence the pleader should have charged a want of care and diligence in the selection of defendant's servants, and not a failure merely to select those who were competent, for such failure may be consistent with proper care.

In the third count the injury is said to have been caused by defendant's allowing its employees to neglect their duties. How? Wherein? Did the company give directions to its conductors or brakemen, the observance of which would tend to throw other employees from the train, or prevent it from being stopped to pick them up? Was there any extraordinary rule or regulation inconsistent with the plaintiff's safety? Or was there habitual or even occasional neglect of duty which, coming to the knowledge of the company's managers, was actually or tacitly approved by them, and by which approval such neglect may be said to have been allowed? No fact is stated, but an inference merely; no ground for that inference is given, and the pleading is too loose to charge any thing.

The whole argument of plaintiff's counsel is outside the pleadings. In considering the company's liability as charged, we might well say that it was the conductor's duty to stop the train and pick up one who had fallen—that it would be an inexcusable act of inhumanity not to do so—and still not hold the company responsible.

If there was any liability, it was under the second section of the statute, which creates a special one; but the first count, based upon that section, was, as we have seen, abandoned, and the counts considered, fail in the allegations necessary to bring the case under it; nor does there seem to have been any attempt to do so, but only to charge a liability outside of this section.

The other judges concurring, the judgment will be affirmed.

NOTE.—See *Gibson v. The Pacific R. R. Co.*, 2 Am. R. 497; *Greenleaf v. Illinois Central R. R. Co.*, 4 id. 181; *Harper v. Indianapolis, etc., R. R. Co.*, 358; *Davis v. Detroit & Milwaukee R. R. Co.*, 1d. 384; *Lalor v. Chicago, etc., R. R. Co.*, 1d. 616; *Chicago & Alton R. R. Co. v. Murphy*, 5 id. 48.—REP.

RICE, plaintiff in error, v. BUNCE, administrator, *et al.*

(49 Mo. 231.)

Estoppel in pais — auction.

Defendant, having an equitable interest in one-half of a lot of land, was present when the lot was offered for sale at auction, but gave no notice of his claim and entered the list of bidders. *Held*, that he was estopped from afterward asserting his title against the purchaser.

BILL in equity. The opinion states the case.

G. T. White, for plaintiff in error.

Draffin & Muir with Edmond Burke, for defendants in error.

WAGNER, J. The plaintiff filed his petition, in the nature of a bill in equity, in the circuit court, for the purpose of vesting in him the title to certain real estate therein mentioned. The case, as made out by the pleadings and proofs, shows that one Seely in his life-time was the proprietor and owner of a lot in the town of Tipton, and that he verbally sold one-half of the same to one Vancise; that Vancise took possession thereof, and directed improvements on the same; that he paid the purchase-money, but received no deed. Subsequently, he became indebted to Seely, and left the premises and removed to Illinois, leaving, however, an agent to control the property.

Seely having died, Bunce administered on his estate and obtained judgment on the debt against Vancise, and caused his equitable interest in the lot to be sold to satisfy the same, and Ferguson became the purchaser, and received a sheriff's deed therefor. Afterward an order was made by the probate court authorizing the administrator to sell the real property of Seely for the payment of debts. Bunce, the administrator, proceeded to advertise and sell the whole of the lots in controversy as the property of Seely's estate, and Shropshire, who is one of the defendants, became the purchaser for the sum of \$550, which the testimony shows was about the full value of the lot. At the administrator's sale, Ferguson, who had purchased the interest of Vancise when the same was sold by the sheriff, appeared and was one of the bidders. His bid was the next highest

to Shropshire's. At the time of the sale, he said nothing about his interest, and did not proclaim that he had any claim or title to the lot. He then sold and transferred by quit-claim whatever interest he possessed in the lot to Rice, the plaintiff, but the whole testimony goes to prove that Rice has never paid or parted with any consideration for the same.

Upon this state of the record the court below gave judgment for the defendants, and the plaintiff sued out his writ of error.

It is insisted by the counsel for the plaintiff in error that although Ferguson was present and bid at the sale, and entered into the competition without in any way indicating that he made any claim to the property being sold, still neither he nor his grantee are estopped by that action. I have examined the authorities he has referred to, and find that they do not sustain the position for which they are cited. They are all clearly distinguishable from this case. I will refer to only two to show their difference. The others may be classed in the same category.

In *Goodson v. Beacham*, 24 Ga. 150, Beacham had title to a lot of land. The interest of Goodson in the lot was levied on. At the sale Beacham gave notice of his title, but was a bidder for the lot, which was knocked off to a third person, and it was held that upon these facts Beacham was not estopped from asserting his title to the lot against the purchaser. But here it will be observed that due notice was given of the claim or title set up, and that the party buying was not misled or kept in ignorance by Beacham's action.

The case of *Hill v. Epley et al.*, 31 Penn. St. 331, is to the same effect. That case decides that a tenant in common whose deed is on record, and who, being present when the land is put up at sheriff's sale, under a judgment against his co-tenant, causes notice to be given that it was only the interest of the judgment debtor that was being sold, is not estopped from asserting his title against the purchaser. Here, again, the notice was given so that the purchaser was not deceived or misled.

The important and primary ground of estoppel by matter *in pais* is, that it would be fraud in a party to assert what his previous conduct had denied, when, on the faith of that denial, others have acted. *Campbell v. Johnson*, 44 Mo. 247; *Chouteau v. Goddin*, 39 id. 229; *Taylor v. Zepp*, 14 id. 482; *Newman v. Hook*, 37 id. 207.

The element of fraud, though said to be essential, may exist in either of two ways: First, in the intention of the party estopped.

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or, second, in the effect of the evidence which he attempts to set up. Thus, if a person encourages another to purchase either land or a chattel, he cannot afterward assert any title in himself to the thing purchased, although he may have been ignorant of his rights when he gave the encouragement; for though there may have been no fraudulent intent, yet the assertion of his title would operate as a fraud, in the same manner as if there had been a fraudulent purpose. In some cases, silence is equally effective in estopping a party against speaking afterward. But if no one has been misled to his hurt—if no injury has arisen from the conduct, declarations or silence of a party—he will not be estopped from contradicting them. It has been said that, if, therefore, the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel. And it has been ruled that silence does not estop when the party's deed is on record. But it should not be forgotten that there is a wide difference between silence and encouragement. A person whose deed is on record might be permitted to remain silent, but if his land is put up for sale, and, without any notification, he enters the list of bidders, and induces and encourages others to bid and expend their money in its purchase, he ought not to be allowed to set up any thing to the detriment of those who have been guided in their action by his conduct. But there is nothing in this transcript to show that the sheriff's deed to Ferguson was ever recorded. There is no certificate of recording indorsed upon it, nor does it appear that it was ever filed for record.

The question of notice is unimportant and immaterial, so far as the plaintiff Rice is concerned. The evidence clearly proves that he has not paid the purchase-money, or parted with any valuable consideration, and in such a case he is not entitled to relief on account of not having any notice. *Bishop v. Schneider*, 46 Mo. 472, and cases cited.

The judgment will be affirmed. The other judges concur.

PACIFIC MUTUAL INSURANCE CO. v. GUSE, appellant.

(49 Mo. 220.)

Mutual fire insurance — assessment of premium note.

In an action by a mutual fire insurance company for the amount of an assessment upon a premium note, *held*, that proof of a resolution of the company's board of directors, levying the assessment to meet the indebtedness of the company, was insufficient to establish the liability on the note, without further proof that the losses and expenses which authorized the assessment had actually occurred. (*See note, p. 135.*)

ACTION by an insurance company.

The opinion states the case.

Henry Flanagan, with *J. Halligan*, for appellant.

J. R. Martin, for respondent.

WAGNER, J. This was an action, commenced before a justice of the peace, to recover an assessment of \$17.50, made by the plaintiff against the defendant on a premium note for \$70. The note specified that it was given for a policy issued by the insurance company, and was to be paid in such portions and at such times as the directors of the said company might, agreeably to the general incorporation laws of the State and the by-laws of the company, require.

Before the justice of the peace, defendant obtained judgment, but, on appeal to the circuit court, judgment was had for the plaintiff.

The only question of any importance in the case is the ruling of the court in admitting evidence. The plaintiff offered in evidence, and the court admitted a copy of a resolution passed by the board of directors, by which an assessment of twenty-five per cent was levied on all premium notes held by the company, to discharge the indebtedness of the company up to a certain date. The resolution was duly certified to by the president and secretary of the company, with the seal of the company affixed.

The defendant objected to the admission of the resolution as evi-

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dence, on the ground that the plaintiff had not proved any loss sustained for which an assessment ought to be made, and on the further ground that a copy of the resolution was no evidence of any acts of the plaintiff; that the original ought to be produced or its absence accounted for. So far as the second point raised in the objection goes, the law settles it against the position taken by counsel. The statute in relation to evidence provides that copies of all records and papers on file in the office of any company, incorporated under the general or special laws of this State, when certified by the secretary or president and authenticated by the seal of said company, shall be received as *prima facie* evidence in all courts of this State, in the same manner and with like effect as the original. Wagn. Stat. 592, § 18.

But the first objection raised presents a question of more difficulty. The case comes under the provisions of the law relating to fire insurance companies, as contained in the general statutes of 1865, pp. 357-359. Section 16 provides for persons becoming members of the company, regulates the manner of taking premium notes, specifies the amount to be paid down, and then says that the remainder of the notes "shall be made payable, in part or in whole, at any time when the directors shall deem the same requisite for the payment of losses or other expenses or purchases." Section 20 empowers the board of directors of every mutual insurance company, in order to settle the losses sustained by fire and the expenses of the company, to make an assessment or assessments, at convenient times, wherein they shall determine the sums to be paid by the several members of the company; and section 26 gives the board of directors power to make an assessment or assessments as often as they deem it necessary to meet the liabilities of the company, and provides that the assessments shall be made payable within thirty days, and that they may also include the necessary incidental expenses.

These statutory provisions are essentially the same as exist in several of the States of this Union, and while they have never come up for construction heretofore in the supreme court of this State, they have often been passed upon by the courts of other States, and the adjudications are harmonious and uniform.

In *Thomas v. Whallon*, 31 Barb. 172, the charter of the company provided that the notes taken by it for premiums should be paid in whole or in part, and at such times as the directors should deem requisite for the payment of losses, and such incidental expenses as should be necessary for transacting the business of the company.

By an amendment of the insurance law which applied to the company, it was provided that the directors should, after receiving notice of any loss or damage by fire sustained by any member, and, ascertaining the same, * * * settle and determine the sums to be paid by the several members thereof as their respective portions, and that the same should be paid thirty days next after notice. And the court held that, upon a proper construction of the foregoing provisions, the directors of the company had no arbitrary discretion in making assessments, but that it devolved upon it to aver and prove that the contingency had happened upon which the defendant's liability had become absolute. So, in *American Insurance Co. v. Schmidt*, 19 Iowa, 502, where the defendant made his note to plaintiff, by which he agreed to pay, for value received, the sum claimed in a certain policy of insurance, "in such portions and at such time or times as the directors of said company may, agreeably to their charter and by-laws, require," it was held that the company could not recover on the notes for an assessment made thereon without alleging and proving that losses and expenses had actually occurred.

And to the same effect are all the cases that we have found in construing like statutes. *Bangs v. Gray*, 12 N. Y. 477; *Herkimer County Mutual Ins. Co. v. Fuller*, 14 Barb. 373; *In re Bangs*, 15 id. 264; *Atlantic Ins. Co. v. Fitzpatrick*, 2 Gray, 279; *Long Pond Insurance Co. v. Houghton*, 6 id. 77; *Savage v. Medbury*, 19 N. Y. 32; *Bangs v. Duckinfield*, 18 id. 592.

The liability of the defendant is not an absolute liability to pay the whole amount of premium or deposit note, but it is conditional, depending upon the contingency of the happening of losses to which he shall be liable to contribute, and which has been ascertained by the directors, and the necessity of the payment of the whole or part of the note to satisfy the claim. The promise of the defendant is to pay upon certain conditions, and the existence of those conditions must be shown by the party seeking to enforce the contract. *Stow v. Wadley*, 8 Johns. 124; *Ferris v. Purdy*, 10 id. 359. Nor was the defendant liable at the mere discretion of the directors. There must have been actual losses or expenses before defendant was liable, as it was for these alone that he was liable, according to the very terms of his contract.

Does the mere passage of a resolution show a right to recover, or should there not be other proof that the payment of the assessment

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was necessary to meet losses and expenses? To require further proof of the plaintiff is imposing no impossible or unreasonable burden. The proof of the facts on which defendant's liability rests is in the possession of the plaintiff, and is easily made. But the other rule would cast the burden of showing negatively that there had been no such losses and expenses as rendered the assessment necessary. And this would involve an examination of the records and papers under the control of the opposite party. There is no arbitrary discretion to make assessments by the directors, and they do not act judicially, and their action is not a proceeding *in rem* which binds all directly or indirectly affected. This conclusion would seem to follow from the nature of the contract between the parties. Assessments cannot be made on these premium notes, unless the necessity therefor properly and legally arises. The protection of the party conditionally bound demands that the other party should show the necessity, not by a mere resolution or declaration, but by proof that payment was legally required. The proof is easily made, and protects alike the interests of all. To hold otherwise would be to place those who have given their premium notes wholly in the power, and at the caprice of the board of directors.

The judgment should be reversed and the cause remanded. The other judges concur.

Judgment reversed.

NOTE. — In an action by a mutual fire insurance company upon a premium note, the plaintiff must give some evidence of the existence of losses which rendered an assessment proper. *Jackson v. Roberts*, 31 N. Y. 304; *Devendorf v. Beasley*, 22 Barb. 656; *The American Ins. Co. v. Schmidt*, 19 Iowa, 502. The assessment of a premium note is but the performance of a ministerial duty, and is, therefore, not final. *Sands v. Sweet*, 44 Barb. 106.

The record of losses kept by a mutual insurance company is sufficient *prima facie* evidence that such losses have occurred. *People's Mutual Ins. Co. v. Allen*, 10 Gray, 207.

An assessment is limited by the amount of the losses sustained and unpaid at the time of making the assessment, and if it be beyond that an action will not lie upon the premium notes. *Stucisippi Ins. Co. v. Taft*, 26 Ind. 240; *Same v. Wheeler*, id. 336; *Same v. Farris*, id. 342; *People's Mutual Fire Ins. Co. v. Babitt*, 7 Allen, 235; *Traders' Mutual Ins. Co. v. Stone*, 9 id. 483.

So in an action by a receiver of an insolvent mutual insurance company, the validity of the claims, for payment of which the assessment was made, must be shown. *Embree v. Shideler*, 36 Ind. 423; *Jackson v. Roberts*, 31 N. Y. 304.

Premium notes, though absolute on their face, will only be liable for assessments regularly made thereon where there are restrictions to that effect in the charter or by-laws of the company. *Fell v. McHenry*, 6 Cor. 41; *Craig v. McHenry*, 11 Casey, 126; *Insurance Co. v. Jarvis*, 22 Conn. 183. But they may be negotiated by the company, and a bona fide holder may recover their full amount. *McIntire v. Preston*, 5 Gilm. (Ill.) 48. See, also, *Farmers' Bank v. Maxwell*, 32 N. Y. 579, and cases cited.

An action on an assessment may be defended on the ground of the illegality of the action of the directors who levied the assessment. *People's Mutual Fire Ins. Co. v. Westcott*, 14 Gray, 440. — REP.

HARTZELL, plaintiff in error, v. SAUNDERS et al.

(40 Mo. 432.)

Innkeeper's lien. Contract. Consideration.

Defendant, an innkeeper, held goods of J. S. to satisfy his board bill. Plaintiff, also an innkeeper, was afterward applied to by J. S. for board, and agreed with defendant to board J. S. a certain time in consideration of defendant's promise to retain the goods as security for plaintiff's bill as well as his own. The goods were released without payment of plaintiff's bill. *Held*, that defendant's promise was founded on a good consideration, and that for the violation of it plaintiff was entitled to recover.

ACTION on contract.

The opinion states the case.

T. A. & A. Green, for plaintiff in error.

Vories & Vories, for defendants in error.

BLISS, J. The plaintiff was an innkeeper in St. Joseph, and charges that defendants, who were also innkeepers, held certain baggage belonging to one Irwin as security for the payment of a hotel bill due them; that said Irwin applied to plaintiff for board for himself and wife, and promised to give him a lien on said baggage, subject to defendants' lien; that they called upon the defendants, who agreed to hold the baggage until their own and the debt due the plaintiff for board, etc., should be paid; but that, in violation of said agreement, they surrendered said baggage to said Irwin, in consequence of which the plaintiff lost the amount due him for keeping said Irwin and wife at his inn. The answer denies the agreement; the testimony was contradictory; the plaintiff failed to recover judgment, and now charges that the following errors were committed upon the trial:

1. He offered in evidence a letter from said Irwin to him, which was rejected as hearsay. The plaintiff had no right to this letter as against the defendants. Irwin was a witness, acknowledged the debt to plaintiff, and his letter was not offered to contradict his tes-

timony, but to establish the plaintiff's claim. It came clearly within the category of inadmissible hearsay testimony, and was properly rejected.

2. The plaintiff asked an instruction, directing a verdict in his favor, if the facts were found as claimed by him, which the court refused to give. Even if the plaintiff's general view was correct, the instruction was vicious, inasmuch as all the necessary facts were not included, and it submitted a question of law to the jury, to wit: Whether the parties held a lien upon the trunks. It does not, however, seem to have been refused upon these grounds, but the court held the alleged promise of defendants to be a *nude pact* and not obligatory. This view of the court clearly appears in the instructions given at the instance of the defendants, and, if correct, the judgment should be affirmed.

The pleading shows that the plaintiff trusted Irwin in consequence of defendants' promise to hold the property to his use, and he testifies that he refused to receive Irwin at his inn until he gave up to him the Saunders house checks for the baggage; that a few days afterward they went together to the Saunders house, exhibited the checks in plaintiff's possession and inspected the baggage, when the alleged promise was made; and that the plaintiff continued to board Irwin and wife on the strength of it, holding on to the checks. This testimony was contradicted in part by defendants and by Irwin, but its truth or falsity does not now concern us, the only question being whether such a promise, if made, was founded upon a sufficient consideration.

The defendants derived no benefit from making the promise, but did not the plaintiff receive an injury from trusting to it? And did not that injury arise from and grow out of the promise? Suppose Irwin had unconditionally sold the baggage to the plaintiff, and that defendants, on being notified of the sale, promised to hold it for him after the lien was satisfied; in that case, would they not become depositaries as truly as though the plaintiff had placed the property in their hands? Their present supposed relation to the property is not precisely that of a depository, but is analogous to it. At the request of the owner and the plaintiff they agreed to hold it until the claim of the latter was satisfied. This was founded on the supposition that the plaintiff held and was to hold a valid claim by virtue of an agreement with Irwin. The transaction partakes of the nature of a voluntary bailment, and of an agreement to enable Irwin

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to obtain a credit. In either case the consideration is sufficient, and the view of the court was erroneous. When their own bill was paid, if the defendants were unwilling to hold the property longer, they should have notified the plaintiff to take it away; and, without having done so, had no right to forward it to Irwin.

The judgment of the court of common pleas will be reversed, and the cause remanded for a new trial.

Reversed and remanded.

MICHAEL, appellant, v. BACON.

(49 Mo. 474.)

Contract — when not immoral.

In an action for work done and material furnished in fitting up a house, it is no defense that the work was done and material furnished with the knowledge, on the part of plaintiff, that defendant intended to use the house for gambling purposes. (*See note, p. 140.*)

ACTION on account. The opinion states the case.

Van Waggoner & Dickson, for appellant, cited *Faikney v. Reynolds*, 4 Burr. 2069; *Holman v. Johnson*, Cowp. 341; *Pellecat v. Angell*, 2 Cr. M. & Rosc. 311; *Hodgson v. Temple*, 5 Taunt. 181; *Tracy v. Talmadge*, 14 N. Y. 169; *Bowry v. Bennet*, 1 Camp. 348; *Cheney v. Duke*, 10 Gill. & J. 11.

H. A. Clover, for respondents, cited *Pearce v. Brooks*, L. R., 1 Exch. 213; *Peck v. Briggs*, 3 Denio, 107; *Ruckman v. Bryan*, id. 340; *Unger v. Boas*, 13 Penn. St. 601; *Ex turpi causa non oritur actio*; *Shiffner v. Gordon*, 12 East, 304; *Belding v. Pitkin*, 2 Caines, 149; *Springfield Bank v. Merrick*, 14 Mass. 322; *Russell v. DeGrand*, 15 id. 39; *Wheeler v. Russell*, 17 id. 281; *Fletcher v. Harcop*, Hutton, 56; *Holman v. Johnson*, Cowp. 343; *Graham v. Musson*, 7 Scott, 770; *King v. Margate Pier Co.*, 3 Barn. & Ald. 221; *Fivaz v. Nicholls*, 2 C. B. 501; *Simpson v. Bloss*, 7 Taunt. 246; *Jennings v. Throgmorton*, Ryan & M. 251; *Girardy v. Richardson*, 1 Esp. 13;

Lloyd v. Johnson, 1 Bos. & Pul. 340; *Bowry v. Bennet*, 1 Campb. 348; *Appleton v. Campbell*, 2 Carr & P. 347; *Bernard v. Lapping et al.*, 32 Mo. 341; *Hayden v. Little*, 35 id. 422; *Shropshire v. Glascock et al.*, 4 id. 536; *Boynnton v. Curle*, id. 599; *Hickerson v. Benson*, 8 id. 8; *Spalding v. Preston*, 21 Vt. 1; *Bloss v. Bloomer*, 23 Barb. 604; *Sto. Part.*, §§ 134, 138, 139, 144-6, 150, 153, 154, 243; *Watson v. Fletcher*, 7 Gratt. 4; *Gow. Part.* 45; *Coll. Part.* (2d ed.) 29, 54; *Wats. Part.* 35, 46; 3 Kent, 28; *Sto. Conf. Laws*, §§ 240, 260.

ADAMS, J. This was an action on an account for work and labor and materials furnished, and fitting up and papering a house on Fourth street, in St. Louis. The main defense set up and relied on was, that the paper was furnished and work done with the knowledge on the part of plaintiff, and by express agreement on his part, that the house was to be used by the defendants as a gambling house. There was no evidence that the plaintiff's purpose, in supplying the materials and fitting up the house, was that it should be used as a gambling house. There was evidence, however, conducing to show that the defendants intended to use the house as a gambling house, and that the plaintiff knew that such was their intention.

The case seems to have been tried on a wrong theory, as we understand the law. The instructions on both sides base the defendants' exemption from liability on the simple fact that the plaintiff knew the purpose for which the defendants intended to use the house. While the plaintiff conceded this proposition, in the instructions asked and given for him, he objected to the same proposition as embodied in instructions given for defendants.

If gamblers can procure work and labor to be performed, and houses to be built and furnished at a heavy expense, by mechanics and others, and then escape all responsibility, under the plea that the laborer, etc., knew that such houses were intended to be used as gambling houses, then I must confess that the law, so understood, instead of being a shield, is a trap for the unwary. I am not aware of any principle of law which compels a merchant, laborer or mechanic to overlook the morals of his customers. He is not the keeper of their morals in any sense of the word. If he sells goods to a gambler, the sale is perfect on the delivery, and the gambler must pay for them, whatever his purpose may have been in making the purchase. If the merchant is not to be paid out of the illicit gains of a gambler, and is not connected by contract with the object the

gambler has in view, his knowledge of the purpose does not vitiate the sale. I know there is conflict in the authorities, in regard to the question under consideration, and some hair-splitting distinctions have been made, sometimes sustaining and sometimes setting aside such sales; but in my judgment the weight of authority and reason is with the ruling, as we here lay it down. *Faikney v. Reynous*, 4 Burr. 2069; *Holman v. Johnson*, Cowp. 341; *Pellecat v. Angell*, 2 Crompt., Mees. & Rosc. 311; *Hodgson v. Temple*, 5 Taunt. 181; *Tracy v. Talmage*, 14 N. Y. 169; *Bowry v. Bennet*, 1 Campb. 348; *Cheney v. Duke*, 10 Gill. & J. 11; *Lightfoot v. Tenant*, 1 Bos. & Pul. 551; *Cannan v. Bryce*, 3 Barn. & Ald. 179; *McKinnell v. Robinson*, 3 Mees. & Welsb. 434. The case of *Pearce et al. v. Brooks*, 1 Law Rep., Exch. 213, so strongly relied on by defendants' counsel as overruling the doctrine of previous English cases, does not in terms profess to do so. The point made in that case was that a man who hired a brougham to a prostitute, knowing that she was a prostitute, and knowing that she intended to use the brougham for purposes of display and attraction, could not recover for the hire, because such knowledge in that case amounted to an intention or design on his part to aid the prostitute in her illegal calling. The court of exchequer does not profess to overrule the previous cases, but, by a sort of hair-splitting distinction, to agree with them. We doubt whether the point was properly ruled in that case, and we therefore disregard it as any authority here.

We think the case under consideration was not properly presented to the jury. The judgment is therefore reversed and the cause remanded. The other judges concur.

Reversed and remanded.

NOTE. — A contract, letting premises for the purpose of keeping a bowling-alley thereon, was held void in *Updike v. Campbell*, 4 E. D. Smith, 570; but the mere avowal by a lessee of an intent to use the leased premises for an immoral purpose — as to keep a bawdy-house — does not justify the lessor in repudiating his contract. *O'Brien v. Brientenbach*, 1 Hilt. 304. A contract to board a bastard and mother, made with the father of the bastard, is void, if there be an express or tacit assent that the illicit intercourse is to continue. *Trovinger v. McBurney*, 5 Cow. 253. See, also, *Fellous v. Emperor*, 13 Barb. 92. But contracts made by way of provision for the support of illegitimate children have generally been held valid. *Jenning v. Brown*, 9 Mees. & Welsb. 496; *Hicks v. Gregory*, 8 C. B. 373.

The mere knowledge by one party, of an illegal intent on the part of the other, is not such a participation in the subsequent illegal act of the other as will deprive the former of his remedy. See *Tracy v. Talmage*, 14 N. Y. 162, wherein the cases are very elaborately reviewed, as they are also in the note thereto.

Taylor v. Chester, 38 L. J. R. 235, was an action to recover a bank note; defendant answered that it was deposited by way of pledge to secure the repayment of money

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advanced to plaintiff. Replication that the money was knowingly advanced for immoral purposes. The facts being proved as alleged, the Queen's Bench held that the defendant was entitled to judgment, as it was impossible that the plaintiff could recover, except through the medium and by the aid of an immoral transaction to which he was himself a party.

Immoral contracts of sale are void, as a contract to supply manuscript for an immoral book (*Gale v. Leckie*, 2 Stark. 98), or to pay for immoral, obscene or libelous caricatures; so one cannot recover the price of clothes sold to a prostitute to promote the success of her employment, and under the expectation of being paid from the profits. But a knowledge of such person's immoral life will not vitiate. *Armstrong v. Tiler*, 11 Wheat. 258; *Stockdale v. Omohy*, 5 B. & C. 178; *Fores v. Johns*, 4 Esp. 97. A contract for the sale of a house is not rendered void by knowledge on the part of the vendor that the purchaser intends it as a residence for his kept mistress. *Armfield v. Tute*, 7 Ired. 258. — RHP.

NORTH MISSOURI R. R. CO. V. MAGUIRE, appellant.

49 Mo. 490.)

Constitutional law. Taxation.

By a convention ordinance of Missouri, it was provided that an annual tax of ten and fifteen per cent of the gross earnings of the North Missouri R. R. Co. should be paid to the State in lieu of other taxation, and applied, in payment of the debt due from the State, on the bonds issued to the company by the State. *Held*, not unconstitutional, either as in violation of articles 5 and 7 of the amendments to the United States constitution (for these articles are only restrictive of federal power), or as impairing the obligation of contracts. Such an ordinance is a valid exercise of the taxing power.

APPEAL from St. Charles circuit court. The opinion states the case.

R. E. Rombauer, for appellant.

Orrick & Emmons, for respondent.

WAGNER, J. This case comes here for review on appeal from the St. Charles circuit court, before which the parties voluntarily appeared, submitting the matters in controversy between them on an agreed statement of facts. The court entered judgment for plaintiffs, and it is to reverse that judgment that this appeal is prosecuted.

While some minor and incidental matters have been discussed, the real questions presented by the record all resolve themselves into one, namely, the validity of the convention ordinance of April, 1865, relating to railroad indebtedness. The first section of the ordinance — and this is all that is material to be here noticed — provides that “there shall be levied and collected from the Pacific Railroad, the North Missouri Railroad and the St. Louis & Iron Mountain Railroad companies, an annual tax of ten per centum of all their gross receipts, for the transportation of freight and passengers (not including amounts received from and taxes paid to the United States) from the 1st of October, 1866, to the 1st of October, 1868, and fifteen per centum thereafter; which tax shall be assessed and collected in the county of St. Louis, in the same manner as other State taxes are assessed and collected, and shall be appropriated by the general assembly to the payment of the principal and interest now due, or hereafter to become due, upon the bonds of the State, and the bonds guaranteed by the State, issued to the aforesaid railroad companies.”

The tax specified in the ordinance was to be collected from each company, only for the payment of the principal and interest on the bonds, for the payment of which each company was liable; and whenever such bonds and interest were fully paid, then no further tax was to be collected from the company.

The objections urged against the ordinance, and contained in the agreed case, are that it is unconstitutional; that it violates the fifth and seventh amendments to the constitution of the United States, and that it is also opposed to that provision which declares that no State shall pass any law impairing the obligation of a contract.

The position assumed, that the ordinance is invalid, because it is repugnant to the amendments designated, cannot be maintained. By a series of adjudications in the national courts, it has been definitely settled that these amendments are limitations of power on the general government, and have no application to the States.

In the case of *Barron v. City of Baltimore*, 7 Pet. 243, the whole question was fully considered and ably examined upon a writ of error to the court of appeals of the State of Maryland. The error alleged was that the State court sustained the action of the defendant, under an act of the State legislature, whereby the property of the plaintiff was taken for public use in violation of the fifth amendment. The court held that its appellate jurisdiction did not extend to the case presented by the writ of error, and Chief Justice MARSHALL, declaring

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the unanimous judgment of the court, said: "The question thus presented is, we think, of great importance, but not of much difficulty. * * * The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes." And, in conclusion, after a thorough examination of the several amendments which had then (1833) been adopted, he observes: "These amendments contain no expression indicating an intention to apply them to State governments. This court cannot so apply them."

That the amendments "were not designed as limits upon the State governments in reference to their own citizens," but "exclusively as restrictions upon federal power," was declared in *Fox v. Ohio*, 5 How. 434, to be "the only rational and intelligible interpretation which these amendments can have." And language equally decisive may be found in *Smith v. State of Maryland*, 18 How. 76, and *Withers v. Buckley et al.*, 20 id. 90. The same doctrine is confirmed in the recent case of *Twitchell v. The Commonwealth*, 7 Wall. 321, where it is said, "the scope and application of those amendments are no longer subjects of discussion."

But the main question is, whether the ordinance violates or impairs any contract entered into between the State and the company, antecedent to its adoption. It is conceded that there was no law prohibiting the State from taxing the company, provided the right was not waived by the enactment which will now be referred to.

The plaintiff here, the North Missouri Railroad Company, made default in the payment of the interest on the bonds guaranteed to the State, and by the provisions of an act of the legislature, approved February 16, 1865, entitled "An act to provide for the completion

of the North Missouri Railroad and its west branch, and for the construction of a bridge over the Missouri river," the mortgage or first lien of the State was released for \$4,350,000 (the amount which the State had guaranteed for the company), and made a second lien, in order that \$6,000,000 of the first mortgage bonds might be placed upon the road to complete it and build the bridge. The act also provided for the appointment by the governor of a fund commissioner for the company, to receive all moneys belonging to the company, and to disburse the same as follows:

1. To said corporation the amounts required from day to day for the actual current expenditure in operating said railroad, and carrying on the ordinary business of said corporation.

2. The amount of his salary as such fund commissioner in monthly installments.

3. The interest upon said first mortgage as the same should fall due.

4. The cost of construction and equipment of the said railroad.

5. The accruing dividends on preferred stock, not exceeding six per cent per annum thereon, in accordance with the provisions of the act in relation thereto.

6. The interest due on the outstanding bonds of the State of Missouri, previously loaned to the company.

7. The payment of the principal of the first mortgage bonds, or, if none should have become due, then the payment of the principal of the bonds of the State; and,

Lastly. The balance to be paid to the corporation.

The ordinance was adopted by the people in June, 1865, after the passage of the legislative enactment, and after its acceptance by the company. It is now claimed by the plaintiff that the act of February, 1865, was a contract between the State of Missouri and the North Missouri Railroad Company, and that the ordinance, levying a tax on the gross receipts of the railroad company, was in direct violation of the contract, because the State's lien was postponed to the lien of the first mortgage authorized by that act, and it was expressly provided that the interest on the first mortgage bonds so created be paid to the fund commissioner, out of the earnings of the road, in the third class of disbursements, and the interest on the lien of the State in the sixth class of disbursements; that the ordinance requiring a tax of ten per cent on the gross earnings to be paid to the State was in violation of the distribution of the earnings provided for by law,

and an attempt on the part of the State to make itself a distributee in the first class.

It is readily admitted that the law of 1865 was a contract, and within the protection of the constitution of the United States, and that the State, after the acceptance of that law by the corporation, could not by an act, except the extinguishment of the mortgage thereby authorized, resume the position of first mortgagee. But is there any thing in the act to prevent the State from exercising the sovereign power of taxation? The act does not pretend to grant exemption from taxation in express terms, and the courts will never presume or infer that the State intends to abandon or surrender the important right of taxation. Whatever restrictions may have been imposed by the adjudications of the national tribunals on the sovereign rights of the States to exercise this vital power of taxation untrammelled, in cases where the State had parted with the right for a valuable consideration, yet all the courts proclaim that the abandonment of the right can never be presumed; that the intention to abandon must appear in the most clear and unequivocal terms. Nor can there be any doubt of the power of the State, by reason of its sovereignty over the whole subject of taxation, to impose taxes on property previously exempt, or to raise the rates, unless there has been some express contract in limitation of the power upon a consideration deemed to be a part of the value of the grant or the charter. *Providence Bank v. Billings*, 4 Pet. 562; *Gordon v. Appeal Tax Court*, 3 How. 133; *Christ Church v. County of Philadelphia*, 24 id. 300; *Philadelphia & Wilmington R. R. v. Maryland*, 10 id. 376; *Jefferson Branch Bank v. Skelly*, 1 Blackf. 447; *Ohio Life Ins. and Trust Co. v. Debolt*, 16 How. 416; *Washington University v. Rowse*, 42 Mo. 325; *St. Joseph v. Hann. & St. Jo. R. R.*, 39 id. 476; *Lionberger v. Rowse*, 43 id. 67; *City of St. Louis v. Boatmen's Ins. and Trust Co.*, 47 id. 150; *Pacific R. R. v. Dulle et al.*, 48 id. 282. In the case of *The City of St. Louis v. Boatmen's Ins. and Trust Co.*, *supra*, there was a clause in the charter which withdrew it from the operation of the general law relating to corporations, contained in the Revised Code of 1855, and it was thence contended that the corporation would not be liable to be taxed. But we decided that that provision simply guaranteed the charter against alteration and repeal, and in no wise granted an immunity from taxation. The act of incorporation was silent on the subject of taxation; and where that was the case, unless there was some contract to be im-

paired where there was a consideration given, it would never be presumed that the legislature had divested itself of the high attribute of sovereignty, the power to tax. The surrender of such an important prerogative was not to be deduced by implication.

In the present case I have failed to find any thing whatever to show that the rate or manner of taxation of the corporation, its franchises or property, formed any part of the contract contained in the act of 1865. Nothing is said about taxation, and it does not seem to have entered into the contract between the parties, but was obviously left where the law had placed it before. No specific provision was made for the fund commissioner's paying the taxes, but he was authorized in the first class of disbursements to pay the current expenditures for carrying on the ordinary business of the corporation, and the payment of taxes would certainly fall within this class.

It is also argued that the tax is unequal, and is therefore opposed to the clause in the constitution which enjoins a uniform rule as to the imposition of taxes on all property. But it must be observed that the ordinance we are considering is a part of the constitution itself, expressly made so by its provisions on its adoption by the people. It is, therefore, a part of the fundamental law of the land. Of course, it must stand as well as any other part of the constitution, and cannot be nullified by the more general provisions of the same instrument, concerning the powers of the legislature, in reference to the general subject of taxation.

We have thus far assumed that the assessment provided for in the ordinance came within the scope and character of taxation. But the point is taken and advanced by the plaintiff that it is not a tax, that it amounts to a sequestration of property for the purpose of paying a debt, and has none of the *criteria* or elements of a tax. The question then arises, is the burden thus imposed by the people on these corporations a tax within the proper meaning of that term, as legally defined? "Taxation," says Chief Justice MARSHALL, "is said to be an absolute power which acknowledges no other limits than those expressly prescribed in the constitution, and, like sovereign power of every description, is trusted to the discretion of those who use it." *McCulloch v. Maryland*, 4 Wheat. 429. In the case of *Glasgow v. Rowse*, 43 Mo. 489, it was said: "Taxes are burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes, or to defray the necessary expenses in administering the government." A tax differs

materially and essentially from a debt. The one is founded on contract; the other is not. A law which specifically appropriated the property of the citizen, and took it from one person and transferred it to another, would not be an exercise of the taxing power, no matter by what name it was called. To settle and fix the exact line of demarcation is a matter of great and perplexing difficulty; but mere oppressiveness in tax laws is no ground for setting them aside or arresting their operation. *Glasgow v. Rowse, supra.*

The power of the sovereign authority to tax is unlimited, and is a power to destroy. The only restraint is in the responsibility of those in whom the power is intrusted. Thus, in *The People ex rel. Griffin v. The Mayor of New York*, 4 N. Y. 419, 423, it was held that the two clauses of the constitution which declare that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation, have no application to the taxing power. It was also decided in that case that the power to tax implies a power to apportion the tax as the legislature shall see fit, and that the power of apportionment has no limit where there is no constitutional restriction.

These views are affirmed in the case of *Brewster et al. v. The City of Syracuse*, 19 N. Y. 116, and also in the case of *The Town of Guilford v. Board of Supervisors of Chenango County*, 13 id. 143. It was held, in the former of these cases, that the legislature had the power to authorize the levy of a tax for the purpose of paying to one who had constructed a municipal improvement, in addition to the contract price, which the corporation by its charter was forbidden to pay. The case of *The Town of Guilford v. The Supervisors of Chenango Co.* holds that the legislature has the power to levy a tax upon the taxable property of the town to meet a claim made against the town, although there is no legal obligation on the part of the town to pay such claim; and in a suit against the town it had been legally determined that the town was not liable to pay such claim. In the case of *Thomas v. Leland et al.*, 24 Wend. 65, it was held that an act of the legislature, imposing a tax upon a local district of the State, in reference to a public improvement, is valid, notwithstanding that previous to the passage of the act a number of individuals of such district had entered into a bond to the State, by which they bound themselves to pay the whole expense of the improvement. These principles were re-affirmed in the case of *Litchfield v. Vernon*,

41 N. Y. 123, and in the case of *The People ex rel. Crowell v. Lawrence et al.*, id. 137.

The settled principles to be deduced from these cases are, that the sovereign power of taxation is lodged in the legislature; that the power of taxing and the power of appropriating taxation are identical and inseparable; that there is no constitutional restraint upon the exercise of its power; that the right of determining what portion of the public burdens, by way of taxation, shall be borne by any individual or class of individuals, must be determined by the legislature; that, however much this power may be abused by the legislature, the only check upon it is the responsibility of the legislative body to its constituents. Redress against unjust taxation must be sought in the same way, and no other, as redress against unjust and oppressive legislation in the general enactment of laws is sought.

The judicial department of the government furnishes no redress in such cases. There is no power in the judiciary to remedy injustice and oppression in a legislative act, except where in the attempted injustice or oppression some constitutional provision is violated. It was so decided by this court in *Hamilton & Treat v. St. Louis County Court*, 15 Mo. 3, where GAMBLE, J., said: "It is a principle, in construing the constitution, that the mere fact that a law is unjust in its operation, or even in the principles upon which it was adopted, does not authorize any expansion of the prohibitions in the constitution beyond their natural and original meaning, in order to remedy the evil in the particular case." This is the admitted construction in cases of legislative enactments, and when it comes to passing upon the organic law, the courts have no power to construe away its natural meaning, or grant relief, on the supposed ground that it is founded on a wrong principle, or commits an injustice. The New York cases are adjudications upon tax laws where the legislature was not restricted in its action over the subject by any constitutional limitations. But here the tax is levied by the constitution itself, where, in the very nature of things, there would be no limitation or restriction over the body making the law and ordering the levy. There is nothing objectionable that we can see in taxing the gross receipts of the corporation. They are an usual and ordinary subject of taxation, and they were selected as a species of property in this instance by the sovereign power, and we have no right to say that the selection was wrong.

It is further argued that the money raised is not raised as a tax,

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because it was not levied or obtained for purposes of revenue. But this argument, it seems to us, is fallacious. The tax was levied and raised for the purpose of paying the interest and principal on a part of the State's indebtedness. How else does the State pay off her indebtedness except by money raised by taxation? When money is once raised by taxation it is revenue, without regard to the question as to what specific purpose it is appropriated or applied. It is usual and customary to levy a certain rate of taxes for special purposes, as, for instance, a certain amount to pay off interest, or to support and maintain schools, etc. The ordinance says that the tax collected and assessed shall be applied to the payment of certain obligations for which the State is bound. This is the only way in which the State can discharge her indebtedness by the collection of taxes, and it is one of the very objects for which taxation is resorted to. The fact that it is levied on the parties primarily liable does not render it invalid, provided there was no constitutional barrier in the way prohibiting the discrimination.

It is admitted by the agreed case that the bonds of the corporation are outstanding and have never been paid. But the agreed case nowhere finds that the ten per cent tax, levied upon the gross earnings of the road, decreased the fund to such an extent as to endanger the prompt payment of interest on the preferred bonds in any manner, or to shut out any of the distributees prior in order to the claims of the State for interest. I cannot, therefore, see that the ordinance is obnoxious to the charge of impairing the obligation of a contract, and I think also that it provides for nothing more than the legitimate exercise of the power of taxation. The question, whether there was any informality in the matter of making the assessment, need not be discussed. If the ordinance was valid, the assessor had jurisdiction, and in such a case the collector cannot be held responsible for any informal or irregular proceeding of the assessor.

It follows, therefore, that the judgment of the circuit court must be reversed.

Judgment reversed.

SHAW, appellant, v. AETNA INSURANCE CO.

(40 Mo. 578.)

Insurance — insurable interest of consignee.

In an action on a policy of insurance, the petition alleged that the plaintiffs, being the owners of a quantity of ice, consigned it to S. & K. to be sold by them on commission; that plaintiffs ordered the consignees to have the ice insured, which they agreed to do, but, instead of insuring it in the names of plaintiffs, they made the insurance in their own names; that a portion of the ice was lost by a peril provided against, and the consignees assigned the policy to plaintiffs. Defendants demurred, on the ground that the consignees had no insurable interest in the ice, and the demurrer was sustained. *Held*, error, because when a consignee accepts a consignment, with instructions from his principal to insure for their benefit, it becomes his duty to insure, and if he neglects to do so, and a loss occurs, he is liable. (*See note*, p. 151.)

ACTION on a policy of insurance. The opinion states the case.

Morris & Peabody, for appellants.

L. Eaton, for respondent.

ADAMS, J. This was an action on a policy of insurance issued by defendant. The plaintiffs filed a second amended petition, to which the defendant demurred; the demurrer was sustained and judgment given thereon against the plaintiffs, from which they appealed to the general term, where the judgment of the special term was affirmed, and the plaintiffs have appealed to this court.

The petition substantially sets forth that the plaintiffs, being the owners of five barges of ice, on the upper Mississippi river, consigned the same to Scherholtz & Klinesmith, of the city of St. Louis, to be sold by them on commission; that the plaintiffs ordered the consignees to have the ice insured, and that the consignees undertook the agency and agreed to have the ice insured for plaintiffs. Instead of insuring the ice in the names of the plaintiffs, they made the insurance in their own names, to indemnify themselves in case of loss, as they would be liable for such loss, having disobeyed the instructions of their principals in not procuring insurance in their names. One of the barges of ice was lost by a peril provided against,

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and the consignees assigned the policy to plaintiffs, and this suit was brought by them as assignees for the value of the lost cargo. The alleged ground of demurrer was that the consignees had no insurable interest in the ice.

A consignee, as such, has no insurable interest in goods consigned to him for sale on commission, unless it be to the extent of the commissions or profits he expects to derive from such sales. This he has a right to insure, regardless of any instructions from the consignor. But if he accepts a consignment, with instructions from his principals to insure for their benefit, it becomes his duty to insure; and if he neglects to do so, and a loss occurs, he is liable to them for the amount. The consignees, in the case under consideration, instead of taking out a new policy in the names of their principals, had the risk entered on their own policy in their own names, as a convenient mode of indemnifying themselves against such damage as they might suffer in not insuring in the names of their principals. I think they had the right to thus protect themselves, and, to this end, they ought to be considered as interested to the full value of the ice. See *Bartlett et al. v. Walter*, 13 Mass. 267; *Oliver v. Greene*, 5 id. 133; *Herkiner v. Rice*, 27 N. Y. 163.

After being ordered to insure, the consignees might have considered themselves trustees for the consignors, and insured in their own names for them. My impression is that in such case the "positive stipulation of the underwriter to pay the loss to the agent, would never be rendered void by the inability of the party really assured to sustain an action on the policy in his own name." See 2 Duer Ins. 7, § 6. In such case, the policy ought to inure to the benefit of the principal, and the agent or consignee be treated as a trustee of an express trust, and the amount of recovery would go to his principal. But whether he is a trustee of an express trust or not, he is, nevertheless, a trustee for the consignor; and, in a suit upon the policy, in the name of the consignee, this may be shown in order to show that he had an insurable interest as trustee for his consignor. The demurrer in this case ought to have been overruled.

Judgment reversed, and cause remanded.

NOTE. — A person having a special, limited interest, or who would suffer any disadvantage by the destruction of the property, either by loss of profit or otherwise, has an insurable interest, whether or not he has any lien upon, title in or possession of the property. *Insurance Co. v. Chase*, 5 Wall. 509, 513; *Putnam v. Mercantile Marine Ins. Co.*, 5 Metc. 386; *Eastern R. R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420; *Ins. Co. v. Woodruff* 8 Dutch 541; *Carter v. The Humboldt Ins. Co.*, 12 Iowa, 287.

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Among the particular interests which may be insured are the interests of the following persons: A reversioner, a mortgagor, a mortgagee, a creditor having a lien, a consignee, factor or agent having a lien on goods for advances; a mechanic having a lien on a building for labor and materials; a commission merchant entitled to commissions on sales, or any person having possession under a contract that may afford him profit or emolument; a warehouseman, wharfinger, common carrier, or bailee of goods; a landlord who has a lien for rent upon his tenant's goods; a sheriff who has seized goods upon execution or attachment; the vendor and vendee under an executory contract of sale; executors, administrators, partners, assignors, lessees and trustees.

For a full discussion of the insurable interest of each of these persons, see *Flanders on Fire Insurance*, 241; *Angell on Fire and Life Insurance*, 99; 3 *Am. Lead. Cas.* 308.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

HALEY *et al.*, plaintiffs in error, v. CITY OF PHILADELPHIA.

(68 Penn. St. 45.)

Constitutional law — declaratory statutes.

The supreme court of Pennsylvania decided that under the laws, as to the opening of roads in Philadelphia, interest was to be allowed on an award from the date of the assessment. By the act of 1867, the legislature provided that the award should be enforced "in the same manner as provided by law in the opening of roads in the city of Philadelphia." By the act of 1869, the legislature declared that the true intent and meaning of the act of 1867 were "that no interest shall be allowed on damages for ground taken, up to the time of their payment on the issue of any warrant for their payment by the city of Philadelphia." In a case arising under the act of 1867, *held*, that the act of 1869, an expository act, was destitute of retroactive force, because it was an act of judicial power, and was in contravention of the constitution of the State, which declares that no man can be deprived of his property "unless by the judgment of his peers or the law of the land." (*See note, p. 156.*)

ACTION upon an award brought by Haley *et al.* against the city of Philadelphia. Under the act of March 26, 1867, plaintiffs' property was appropriated for a park and vested in the city. The report of the jury assessing damages was filed April 14, 1868, but it was not confirmed until May 9, 1868. The principal sum, \$45,746.74, was

paid April 3, 1869, and was received by plaintiffs under an agreement that their claim to interest should not be prejudiced.

The plaintiffs' points were :

1. The plaintiffs are entitled to recover interest on the amount awarded them from the day upon which the jury returned and filed their report, to wit, from April 14, 1868.

2. The plaintiffs are entitled to recover interest upon the amount due and unpaid from the date of the payment of the principal, to wit, from April 3, 1869.

The court (HARRIS, P. J.) instructed the jury to find the full amount of the plaintiffs' claim, and reserved the points.

The jury found for the plaintiffs \$2,842.62.

Judgment was afterward entered on the reserved points for \$2,504.91, being interest from the confirmation of the report.

The plaintiffs took a writ of error and assigned for error; not entering judgment for the amount of the verdict.

By the act of April 14, 1868 (a supplement to act of March 26, 1867), § 10, Pamph. Laws 1086, it is provided, among other things, that "whenever any report of the commissioners or jury shall have been confirmed by the court, the valuation shall be forthwith payable by the city of Philadelphia." By another supplement, April 21, 1869, § 9, Pamph. Laws, 1196, it is enacted that "the true intent and meaning" of the acts of 1867 and 1868 were, "that no interest shall be allowed on damages for ground taken, up to the time of their payment on the issue of any warrant, for their payment by the city of Philadelphia."

J. Parsons (with whom was *J. C. Bullitt*), for plaintiffs in error.

C. H. Jones (with whom was *T. J. Barger*, city solicitor), for defendant in error.

SHARSWOOD, J. It was undoubtedly competent for the legislature, in providing for the ascertainment and payment of damages for property taken and appropriated for public use, as in this case of the Fairmount Park, to direct at what time the amount should be payable, and a jury in assessing the damages must govern itself accordingly. It might be a more just provision to direct in every case interest from the date of the assessment. We must look to and be governed by the law as it stood at the time when the jury

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made the assessment. The 10th section of the act of April 14, 1868, Pamph. Laws, 1086, has no application to this case, because, although the report of the jury was filed on the 14th day of April, 1868, the day the act was approved by the governor, and became a law, yet the jury had been appointed, proceeded and found their verdict under the previous act of March 26, 1867, Pamph. Laws, 547. By the 3d section of that act it was provided that owners of ground taken should be paid according to the value to be ascertained by a jury: "And said jury shall proceed, and their award shall be reviewed and enforced, in the same manner as provided by law in the opening of roads in the city of Philadelphia." It was settled by this court in *The City of Philadelphia v. Dyer*, 41 Penn. 463, that under the laws, as to the opening of roads in the city of Philadelphia, interest is to be allowed from the date of the assessment. We are of opinion that the court below erred in reducing the amount of the verdict and entering judgment for such reduced amount under the reserved point.

The only other question which can arise upon this record is, as to the effect of the act of April 21, 1869, § 9, Pamph. Laws, 1194. This section is a legislative declaration that the true intent and meaning of the acts of 1867 and 1868 were, "that no interest shall be allowed on damages for ground taken, up to the time of their payment on the issue of any warrant for their payment by the city of Philadelphia." In connection with this act, much reliance is placed upon the case of *O'Connor v. Warner*, 4 W. & S. 223, in which it was held by this court that, until the judiciary has fixed the meaning of a doubtful law upon which rights have become vested, it may be explained by legislative enactment. It is clear that this principle was only intended to apply to a law the construction of which was really doubtful. Chief Justice GIBSON, in that case, declares that "a legislative direction to perform a judicial function in a particular way would be a direct violation of the constitution, which assigns to each organ of the government its exclusive function and a limited space of action." *Lambertson v. Hogan*, 2 Barr, 25; *Greenough v. Greenough*, 11 Penn. St. 495. It would be monstrous to maintain that, where the words and intention of an act were so plain that no court had ever been appealed to for the purpose of declaring their meaning, it was, therefore, in the power of the legislature, by a retrospective law, to put a construction upon them, contrary to their obvious letter and spirit. *Reiser v. The William Tell Saving Fund Associa-*

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tion, 39 Penn. St. 137, is an authority in point against such a doctrine. An expository act of assembly is destitute of retroactive force, because it is an act of judicial power, and is in contravention of the ninth section of the ninth article of the constitution, which declares that no man can be deprived of his property, "unless by the judgment of his peers or the law of the land."

Judgment reversed, and now judgment for the plaintiff for the amount found by the verdict.

Judgment accordingly.

NOTE.—In *People v. Supervisors of New York*, 16 N. Y. 424, the legislature, after the courts had decided that insurance companies were taxable at a certain rate under an existing statute, passed an act declaring it to have been the intention and the true construction of such existing statute, that insurance companies should be taxable only at a certain other rate, and the court of appeals held that, while the declaratory act might introduce a new rule for the taxation of such companies after its passage, it was ineffectual in regard to the interpretation of the prior statute in controversies pending in court, and that the legislature cannot control the courts in respect to the construction of statutes, in cases arising before the declaratory statute. To the same effect is *Greenough v. Greenough*, 11 Penn. St. 494; *Dash v. Van Kleeck*, 7 Johns. 498; *Governor v. Porter*, 5 Humph. 165. It is beyond the legislative power to set aside the judgments of the courts, to require them to grant new trials, or to do any other particular act in the progress of a judicial inquiry. *State v. Fleming*, 7 Humph. 152; *Dorr's Case*, 3 R. I. 291; *Picqua's Case*, 5 Pick. 64.

Thus the legislature cannot grant the right to appeal a case after it was gone under the general statute. *Burch v. Newberry*, 10 N. Y. 374; *Hill v. Sunderland*, 3 Vt. 507. But see *Prout v. Berry*, 2 Gill. 147, and *State v. Northern Central R. R. Co.*, 18 Md. 196, wherein it was held that the legislature could allow an appeal in a particular case.

So it is beyond the legislative power to revive a commission for proving claims against an estate after it has once expired (*Bradford v. Brooks*, 2 Ark. 234), or to grant a continuance in a pending case (*Burt v. Williams*, 24 Id. 91), or to forbid an appellate court to reverse a decision of the court below, without a vote of the majority of the judges competent to sit. *Clapp v. Ely*, 3 Dutch. 622.

Nor has the legislature power to grant a new trial. *Lewis v. Webb*, 3 Greenl. 326; *Durham v. Lewiston*, 4 Id. 140; *Weaver v. Lapeley*, 43 Ala. 224; *Dechastellux v. Patrichide*, 15 Penn. St. 18; *Taylor v. Place*, 4 R. I. 324; *Müller v. State*, 3 Gill. 145; *Athinson v. Dunlop*, 50 Me. 111; *Young v. State Bank*, 4 Ind. 301.

For a full discussion of the subject of declaratory legislation, see Cooley's Const. Lim. 98, et seq. — REP.

DAY, plaintiff in error, v. ZIMMERMAN.

(66 Penn St. 22.)

Promissory note. Attachment. Garnishment.

A, on the 1st of March, 1866, gave his negotiable promissory note to B, payable in two years. C, a creditor of B, served an attachment on A, as garnishee, in November, 1867. B indorsed the note February 22, 1868, to D, *bona fide* for value, D having no notice of the attachment, but having heard that B had failed. After maturity, A paid the amount of the note to D. *Held*, that the note was discharged, and that A was not liable under the attachment

SCIRE FACIAS in a foreign attachment by Peter Zimmerman against Israel L. Day, garnishee of Depue S. Miller, issued September 7, 1868. It appeared that, on the 1st of March, 1866, Day gave his negotiable promissory note, payable in two years, to Miller, and that the foreign attachment was issued and served November 8, 1867, at the suit of Zimmerman, a creditor of Miller. On the 22d of February, 1868, Miller indorsed the note to Yohe & Depue *bona fide* for value, the purchasers having no notice of the attachment, but having heard that Miller had failed. After maturity, Day paid the amount of the note to Yohe & Depue, the holders.

The defendant submitted these points, which the court refused:

1. If Yohe & Depue bought the note of the defendant without actual notice of the attachment before its maturity, the payment to them by defendant was a good and valid defense to this attachment, and their verdict must be for the defendant.

2. There is no evidence that the defendant Day in any way assisted Miller in passing the note in question to Yohe & Depue.

The verdict was for the plaintiff against the garnishee, for \$416.83.

The garnishee removed the case to the supreme court, and, among others, assigned for error the refusal to affirm his points.

G. Junkin, for plaintiff in error. The presumption is, that an indorsee has received the note in the usual course of business. *Snyder v. Riley*, 6 Penn. St. 164. The doctrine of implied notice by *lis vendens* is not applicable in such cases. *Kieffer v. Ehler*, 18 Penn. St.

388; *Hill v. Kroft*, 29 id. 186; *Ludlow v. Bingham*, 4 Dall. 47; *Maine Ins. Co. v. Weeks*, 7 Mass. 439; *Enos v. Tuttle*, 3 Conn. 27; *Huff v. Mills*, 7 Yerg. 42; *Hinsdill v. Stafford*, 11 Verm. 309; *Little v. Hale*, id. 482; *Eunson v. Healy*, 2 Mass. 32; *Grant v. Shaw*, 16 id. 341; *Cushman v. Hayne*, 20 Pick. 132.

J. G. Shipman (of New Jersey) and *L. D. Vail*, for defendant in error.

WILLIAMS, J. The law is well settled that a promissory note is liable to be attached before maturity in the hands of the maker, at the suit of a creditor of the payee. Though not due, it is a debt within the meaning of the attachment laws, and, therefore, as between the payee and attaching creditor, it is bound by the service of the attachment on the maker; and if, after being attached, it remains in the hands of the payee until maturity, it is bound by the attachment as against all persons into whose hands it may thereafter come. But the attachment is unavailing, as against a *bona fide* holder or indorsee, for value, to whom it has been transferred before maturity, without actual notice of the attachment. The doctrine of notice by *lis pendens* is not applicable to such a case. *Kieffer v. Ehler*, 18 Penn. St. 388; *Hill v. Kroft*, 29 id. 186; and, therefore, a subsequent holder is not affected with constructive notice of the attachment.

In the case before us, the evidence shows that Yohe & Depue purchased the note in controversy of the payee, at their banking-house in Easton, shortly before its maturity, for \$5,450, without any notice of the attachment whatever. The fact that they had heard that the payee had failed and gone west was not sufficient to put them upon inquiry, as to his right to dispose of the note. It was no notice of the attachment, nor of any thing from which it could be inferred. It is clear, then, that they took a good title to the note as against the plaintiff's attachment. There was no evidence that the defendant assisted the payee in selling the note, or that he knew of his intention to dispose of it until after the sale had taken place. Nor was there any evidence that the defendant colluded with the payee for the purpose of enabling him to hinder or defraud his creditors. So far as the defendant's cross-examination shows, and this is all the evidence on the subject, he did not purchase the property for which the note in part payment was given, for less than its value, nor with intent to cover it up and conceal it from the payee's creditors. The

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defendant was clearly entitled, under the uncontradicted evidence in the case, to an affirmative answer to the points which were submitted by his counsel. Instead of declining to charge as requested, the court should have instructed the jury that there was no evidence that the defendant, in any way, assisted the payee in passing the note to Yohe & Depue; and if they bought it without actual notice of the attachment, before its maturity, the payment to them by defendant was a good and valid defense to the attachment, and their verdict must be for the defendant.

It is clear that under the law and the evidence, the plaintiff was not entitled to recover.

Judgment reversed, and a venire facias de novo awarded.

 MORRIS' RUN COAL CO., plaintiffs in error, v. BARCLAY COAL CO.

(66 Penn. St. 172.)

Restraint of trade. Conspiracy. Illegal contract.

Five coal corporations of Pennsylvania entered into an agreement, in New York, by which they agreed to divide the market for the bituminous coal, from the two coal regions of which they had control, in certain proportions; to appoint a committee to take charge of the business of all the corporations, and to appoint a general sales-agent, to be stationed at Watkins, New York. By the agreement, it was further provided, that each company was to deliver its proportion of the coal at such times and to such parties as the committee should, from time to time, direct; that the committee should adjust the prices of coal in the different markets; that the general agent should direct a suspension of shipment or delivery of coal by any of the companies making sales or deliveries beyond its proportion. By a statute of New York, "If two or more persons shall conspire to commit any act injurious . . . to trade or commerce, they shall be deemed guilty of a misdemeanor." In an action on a draft, given in furtherance of this agreement, *held*, that the agreement was in contravention of the statute and against public policy, and, therefore, illegal and void; also, that the draft was tainted with the illegality, and could not be recovered upon.

ACTION by the Morris' Run Coal Company against the Barclay Coal Company upon an accepted draft on the defendants, in favor

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of plaintiffs, for \$2,466.99. The opinion states the facts. Judgment for defendants. Plaintiffs took out a writ of error.

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U. Mercur (with whom was *E. Overton, Jr.*), for plaintiffs in error. The agreement was but for a year, and to operate in but a limited portion of the State of New York; it was not a general restraint of trade, and, therefore, was good. Chitty on Contracts, 591, 597, 599. The restraint is valid, unless plainly beyond what the party's interests require. *Wickens v. Evans*, 3 Yerg. & J. 318. The action is on the draft, and the contract was not needed to establish it. *Swan v. Scott*, 11 Serg. & Rawle, 164; *Thomas v. Brady*, 10 Penn. St. 164; *Scott v. Duffy*, 14 id. 20. The contract was executed. *Lestapies v. Ingraham*, 5 Penn. St. 71; *Fox v. Cash*, 11 id. 207. The defendant's acceptance was on a new consideration. *Tole v. Armstrong*, 4 Wash. C. C. 299.

J. De Witt, for defendant in error.

AGNEW, J. This was an action on a bill, drawn upon one party in favor of another party, to a contract between five coal companies, for a sum found due in the equalization of prices under the contract. It raises a question of great importance to the citizens of this State and the State of New York, where the contract was made, and was in part to be executed, to wit: Whether the contract was illegal as being contrary to the statute of New York, or at common law, or against public policy. The instrument bears date the 15th day of February, 1866. The parties are five coal companies, incorporated under the laws of Pennsylvania, to wit: The Fall Brook Coal Company and Morris' Run Coal Company, of the Blossburg coal region; and the Barclay Coal Company, Fall Creek Bituminous Coal Company and Towanda Coal Company, of the Barclay coal region. By the agreement, the market for the bituminous coal from these two regions is divided among these parties in certain proportions. A committee of three is appointed to take charge and control of the business of all these companies, to decide all questions by a certain vote, and to appoint a general sales agent, to be stationed at Watkins, New York. Provision is made for the mining and delivery of coal, their kinds, and for its sale through the agent, subject, however, to this important restriction, that each party shall, at its own costs and expense, deliver its *proportion* of the different kinds of coal in the

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different markets *at such times and to such parties as the committee shall, from time to time, direct.* The committee is authorized to adjust the prices of coal in the different markets and the rates of freight, and also to enter into such an agreement with the anthracite coal companies as will promote the interests of these parties. Then comes an important provision that the companies may sell their coal themselves, but only to *the extent of their proportion, and only at the prices adjusted by the committee.* It is also provided that the general sales agent shall direct a suspension of shipment or deliveries of coal by any party making sales or deliveries *beyond its proportion,* and thereupon such party *shall suspend shipments* until the committee shall direct a resumption. Detailed reports of the business are to be made by the companies to the general sales agent at fixed and short intervals, and settlements are to be made by the committee monthly, prices averaged, and payments made by the companies in excess to those in arrear; and, finally, each party binds itself *not to cause or permit any coal to be shipped or sold otherwise than as the same has been agreed upon, and that all rules and regulations by the executive committee, in relation to the business, shall be faithfully carried out.*

In regard to the relation these companies hold to the public, the field of their mining operations, the markets they supply, the extent of their coal fields, and the general supply of coal, the distinguished referee, Judge ELWELL, finds as follows: "The Barclay and Blossburg coal mines are the only coal mines furnishing the kind of coal mined and shipped by these companies, except the Cumberland coal, which latter, in order to reach the same markets north, would have to be shipped by tide-water. There was some of the same kind of coal mined in McKean and Elk counties, in this State, but in quantities so small as that it was not considered by these companies as coming into competition with them. The coal of the Blossburg and Barclay regions is adapted to mechanical purposes and for generating steam. Wherever sold, it comes into competition with anthracite coal, and also with the Cumberland coal sent by tide-water to Troy, N. Y., to which point both kinds of bituminous coal are shipped."

During the season of 1866, these companies made sales of coal at Oswego and Buffalo, to parties who shipped to Chicago, Milwaukee and other western cities. It there came into competition to some extent with Pittsburg coal. The latter is used for making gas, but the coal of these companies cannot be used for that purpose.

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The referee found that the statute of New York is, "if two or more persons shall conspire," first, "to commit any offense ;" second, "to commit any act injurious to the public health, to public morals, or to trade or commerce, they shall be deemed guilty of a misdemeanor."

The referee found, as his conclusion upon the whole case, that the contract was void by the statute, and void at common law, as against public policy. The restraint of the contract upon trade and its injury to the public is thus clearly set forth by the referee : "These corporations," he says, "represented almost the entire body of bituminous coal in the northern part of the State. By combination between themselves they had the power to control the entire market in that district. And they did control it by a contract not to ship and sell coal otherwise than as therein provided. And, in order to destroy competition, they provided for an arrangement with dealers and shippers of anthracite coal. They were thereby prohibited from selling under prices to be fixed by a committee representing each company. And they were obliged to suspend shipments, upon notice from an agent that their allotted share of the market had been forwarded or sold. Instead of regulating the business by the natural laws of trade, to wit : Those of demand and supply, these companies entered into a league, by which they could limit the supply below the demand, in order to enhance the price. Or, if the supply was greater than the demand, they could, nevertheless, compel the payment of the price arbitrarily fixed by the joint committee. The restraint on the trade in bituminous coal was, by this contract, as wide and extensive as the market for the article. It already embraced the State of New York, and was intended and no doubt did affect the market in the western States. It is expressly stipulated that the parties to this contract shall not be considered as partners. The agreement was not entered into for the purpose of aggregating the capital of the several companies, nor for greater facilities for the transaction of their business, nor for the protection of themselves by a reasonable restraint, as to a limited time and space, upon others who might interfere with their business."

The plaintiff in error's reply to this vigorous statement of the purpose of the contract, and its effect upon the public interest, alleges that its true object was to lessen expenses, to advance the quality of the coal, and to deliver it in the markets it was to supply, in the best order to the consumer. This is denied by the defend-

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ants ; but it seems to us it is immaterial whether these positions are sustained or not. Admitting their correctness, it does not follow that these advantages redeem the contract from the obnoxious effects so strikingly presented by the referee. The important fact is, that these companies control this immense coal field ; that it is the great source of supply of bituminous coal to the State of New York and large territories westward ; that, by this contract, they control the price of coal in this extensive market, and make it bring sums it would not command if left to the natural laws of trade ; that it concerns an article of prime necessity for many uses ; that its operation is general in this large region, and affects all who use coal as a fuel ; and this is accomplished by a combination of all the companies engaged in this branch of business in the large region where they operate. The combination is wide in scope, general in its influence, and injurious in effects. These being its features, the contract is against public policy, illegal, and therefore void.

The illegality of contracts affecting public trade appears in the books under many forms. The most frequent is that of contracts between individuals, to restrain one of them from performing a business or employment. The subject was elaborately discussed in the leading case of *Mitchell v. Reynolds*, 1 P. Wms. 181 ; to be found, also, in 1 Smith's Lead. Cas. 172. The distinction is there taken which now marks the current of judicial decision everywhere ; that a restraint, upon a trade or employment which is general, is void, being contrary to public interest, really beneficial to neither party, and oppressive at least to one. "General restraints," says PARKER, J., "are all void, whether by bond, covenant or promise, with or without consideration, and whether it be of the party's own trade or not ;" citing Croke Jam. 596 ; 2 Buls. 136 ; Allen, 67. "To obtain," he says, "the sole exercise of any known trade throughout England is a complete monopoly, and against the policy of the law." A reason given is "the great abuses these voluntary restraints are liable to, as, for instance, from corporations, who were perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible." In reference to a contract not to trade in any part of England, it is said, there is something more than a presumption against it, because it never can be useful to any man to restrain another from trading in all places, though it may be to restrain him from trading in some, unless he intends a monopoly, which is a crime. These principles have been sustained in many

cases which need not be cited, as most of them will be found in Mr. Smith's note to the leading case. The result of those in which particular restraints upon trade have been held to be valid between individuals is, that the restraint must be partial only, the consideration adequate and not colorable, and the restriction reasonable. Upon the last requisite, TINDALL, C. J., remarks, in *Horner v. Graves*, 7 Bing. 743 : "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection as to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatsoever restraint is larger than the necessary protection of the party can be of no benefit to either ; it can only be oppressive, and, if oppressive, it is in the eye of the law unreasonable. What is injurious to the public interest is void on the ground of public policy."

Many cases have been decided as to what is a reasonable restriction and what is not, and is therefore void, but two only may be referred to as illustrations. In *Mallan v. May*, 11 Mees. & Welsb. 653, a covenant not to practice as a dentist in London, or in any of the places in England or Scotland, where the plaintiff might have been practicing before the expiration of the term of service with them was held to be reasonable as to the limit of London, but unreasonable and void as to the remainder of the restriction. So in *Greer v. Price*, 13 Mees. & Welsb. 695, a covenant not to follow the perfumery business in the cities of London and Westminster, or within the distance of 600 miles therefrom, was good as to the cities and void as to the limit of 600 miles. See, also, *Pierce v. Fuller*, 8 Mass. 223, and *Chappel v. Brockway*, 21 Wend. 158. An important principle stated in these cases is, that, as to contracts for a limited restraint, the courts start with a presumption that they are illegal, unless shown to have been made upon adequate consideration, and upon circumstances both reasonable and useful. This presumption is a necessary consequence of the general principle, that the public interest is superior to private, and that all restraints on trade are injurious to the public in some degree. The general rule (said WOODWARD, C. J.) is, that all restraints of trade, if nothing more appear, are bad : *Keeler v. Taylor*, 53 Penn. St. 468. That case may be instanced as a strong illustration of the rule as to what is not a reasonable restriction ; and the principles I have been stating are recognized in the opinion. Keeler agreed to instruct Taylor in the art of making

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platform scales, and to employ him in that business at \$1.75 per day. Taylor engaged to pay Keeler or his legal representatives, \$50 for each and every scale he should thereafter make for any other person than Keeler, or which should be made by imparting his information to others. This was held to be an unreasonable restriction upon Taylor's labor, and therefore void, as in restraint of trade. Testing the present contracts by these principles, the restrictions laid upon the production and price of coal cannot be sanctioned as reasonable, in view of their intimate relation to the public interests. The field of operation is too wide and the influence too general.

The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality of the contract, to wit: The combination resorted to by these five companies. Singly each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise. Or, if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer, all feel the restraint, while many dependent hands are paralyzed, and hungry mouths are stinted. The influence of a lack of supply, or a rise in the price of an article of such prime necessity, cannot be measured. It permeates the entire mass of community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract, it is an offense. "I take it," said GIBSON, J., "a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or to oppress individuals, by unjustly subjecting them to the power of the confed-

erates, and giving effect to the purpose of the latter, whether of extortion or of mischief." *Commonwealth v. Carlisle*, Brightly's Rep. 40. In all such combinations, where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the combination of many, what severally no one could accomplish, and even what when done by one would be innocent. It was held in *The Commonwealth v. Eberle*, 3 Serg. & Rawle, 9, that it was an indictable conspiracy for a portion of a German Lutheran congregation to combine and agree together to prevent another portion of the congregation, by force of arms, from using the English language in the worship of God among the congregation. So a confederacy to assist a female infant to escape from her father's control with a view to marry her against his will, is indictable as a conspiracy at common law, while it would have been no criminal offense if one alone had induced her to elope with and marry him. *Mifflin v. Commonwealth*, 5 W. & S. 461. One man or many may hiss an actor, but if they conspire to do it they may be punished. Per GIBSON, C. J., *Hood v. Palm*, 8 Penn. St. 238; 2 Russell on Crimes, 556. And an action for a conspiracy to defame will be supported, though the words be not actionable, if spoken by one. *Hood v. Palm, supra*. "Defamation by the outcry of numbers," says GIBSON, C. J., "is as resistless as defamation by the written act of an individual." "And," says COULTER, J., "the concentrated energy of several combined wills, operating simultaneously and by concert upon one individual, is dangerous even to the cautious and circumspect, but, when brought to bear upon the unwary and unsuspecting, it is fatal. *Twitchell v. Commonwealth*, 9 Barr, 211. There is a potency in numbers, when combined, which the law cannot overlook, where injury is the consequence. If the conspiracy be to commit a crime, or an unlawful act, it is easy to determine its indictable character. It is more difficult when the act to be done, or purpose to be accomplished, is innocent in itself. Then the offense takes its hue from the motives, the means or the consequences. If the motives of the confederates be to oppress, the means they use unlawful, or the consequences to others injurious, their confederation will become a conspiracy. Instances are given in *The Commonwealth v. Carlisle*, Bright, 40. Among those mentioned as criminal is a combination of employers to depress the wages of journeymen below what they would be if there were no resort to artificial means; and a combination of the bakers of a town to hold up the article of bread, and by means of the scarcity thus

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produced to extort an exorbitant price for it. The latter instance is precisely parallel with the present case. It is the effect of the act upon the public which gives that case and this its evil aspect as the result of confederation; for any baker might choose to hold up his own bread, or coal operator his coal, rather than to sell at ruling prices; but when he destroys competition by a combination with others, the public can buy of no one.

In *Rex v. De Berenger*, 3 M. & S. 68, it was held to be a conspiracy to combine to raise the public funds on a particular day by false rumors. The purpose itself, said Lord ELLENBOROUGH, is mischievous, it strikes at the price of a valuable commodity in the market, and if it gives a fictitious price by means of false rumors, it is a fraud leveled against the public, for it is against all such as may possibly have any thing to do with the funds on that particular day. Every "corner," in the language of the day, whether it be to affect the price of articles of commerce, such as breadstuffs, or the price of vendible stocks, when accomplished by confederation to raise or depress the price and operate on the markets, is a conspiracy. The ruin often spread abroad by these heartless conspiracies is indescribable, frequently filling the land with starvation, poverty and woe. Every association is criminal whose object is to raise or depress the price of labor beyond what it would bring if it were left without artificial aid or stimulus. *Rex v. Byerdike*, 1 M. & Rob. 179. In the case of such associations, the illegality consists most frequently in the means employed to carry out the object. To fix a standard of prices among men in the same employment, as a fee bill, is not in itself criminal, but may become so when the parties resort to coercion, restraint or penalties upon the employed or employers, or what is worse, to force of arms. If the means be unlawful, the combination is indictable. *Commonwealth v. Hunt*, 4 Metc. 111. A conspiracy of journeymen of any trade or handicraft to raise the wages by entering into combination to coerce journeymen and master workmen employed in the same branch of industry, to conform to rules adopted by such combination, for the purpose of regulating the price of labor, and carrying such rules into effect by over acts, is indictable as a misdemeanor. 3 Whart. O. L., citing *The People v. Fisher*, 14 Wend. 9. Without multiplying examples, these are sufficient to illustrate the true aspect of the case before us, and to show that a combination, such as these companies entered into, to control

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the supply and price of the Blossburg and Barclay regions is illegal, and the contract therefore void.

A second question is, whether the bill drawn in this case by the general sales agent on the Barclay Coal Company, in favor of the Morris Coal Company, to equalize prices upon a settlement under the contract, is such an independent cause of action as will support the suit. When a bill, note or bond is but an instrument to execute an illegal contract, it is tainted by the illegality and cannot be recovered. The illegal consideration enters directly into the instrument, and is followed up because the law will not permit itself to be violated by mere indirection. This is the principle mentioned in the cases of *Steers v. Lashley*, 6 Term Rep. 61; *Swan v. Scott*, 11 S. & R. 164; *Stanton v. Allen*, 5 Denio, 434; *Fisher v. Bridges*, 3 E. & B. 642; *Lestapies v. Ingraham*, 5 Penn. St. 82. In the last case, GIBSON, C. J., says: "The solemnity of the security would not preclude an inquiry into the consideration of it, had it been illegal;" and in *Swan v. Scott*, DUNCAN, J., said of a bond, the consideration of which grew out of an illegal transaction, "there the illegal consideration is the sole basis of the bond, and there can be no recovery." In the present case, the bill itself refers directly to the equalization account, and was given in immediate execution of the contract. This being the case, it is distinguishable from *Fackney v. Reynous*, 4 Burr. 2069; *Petrie v. Hannay*, 3 Term. Rep. 418; *Farmer v. Russell*, 1 Bos. & Pul. 295; *Lestapies v. Ingraham*, *supra*; *Thomas v. Brady*, 10 Penn. St. 164, cases where the action was not upon the illegal contract, or upon an instrument in execution of it, but was founded upon a new consideration. The distinction is well stated by Judge WASHINGTON, in *Toler v. Armstrong*, 3 Wash. C. C. 297, affirmed in the supreme court of the United States, 11 Wheat. 258. The present case is free of difficulty, the money represented by the bill arising directly upon the contract, to be paid by one party to another party to the contract, in execution of its terms. The bill itself is therefore tainted by the illegality, and no recovery can be had upon it.

The judgment is therefore affirmed.

DUNGAN'S APPEAL. BLAKE'S APPEAL.

(88 Penn. St. 204.)

United States tax lien — proceeds of property sold on execution.

The fixtures and furniture of the tenant of a distillery, upon which the United States had a lien, were sold under an execution issued on a judgment obtained against him by a creditor in a State court. *Held*, that the property was not sold subject to the lien, but that the lien was to be first discharged. The lien of the United States on the proceeds is superior to that of the judgment creditor or of the landlord for rent.

APPEAL from a decree of the district court of Philadelphia. It appears that a writ of *feri facias* was issued at the suit of James Blake & Co. against Winston F. Rogers, and the funds arising from the sale of the property (fixtures, etc., of a distillery) were brought into court for distribution. An auditor was appointed to distribute the fund, which amounted to \$1,332.17. The claimants were the United States revenue collector, J. Dyre Dungan, the landlord of the premises which were occupied by the defendant, and the plaintiffs in the execution. The claim of the United States was \$1,613; and the auditor awarded the whole proceeds of the sale to the collector. The report was confirmed. Thereupon, Dungan and Blake appealed.

P. Archer and *L. C. Cassidy*, for Dungan; *G. Junkin*, for Blake. The sheriff sold *subject* to the fixed lien of the government. *Reed's Appeal*, 13 Penn. St. 476; *Vandyke v. Bennett*, 1 Tr. & H. 724; *Metzer v. Menor*, 8 Watts, 296; *Vandever v. Baker*, 13 Penn. St. 121; *Mann's Appeal*, 50 id. 375.

The right of the government could not operate over the lien of a prior contract — the lease.

N. H. Sharpless (with whom was *J. Cooke Longstreth*), for appellee, referred to the acts of congress cited in the auditor's report. *Taylor v. Carryl*, 24 Penn. St. 259; S. C., 20 How. 583; *Hagan v. Lucus*, 10 Pet. 400.

The landlord has no *lien* for rent on goods sold under execution; he has merely priority of payment from the proceeds.

READ, J. By the report of the auditor, it appears that the property sold were the fixtures of the distillery of Winston F. Rogers, the defendant in the Blake judgment, consisting of tubs, boilers, tools, stills, etc., with some office furniture of inconsiderable value, all on and belonging to the distillery premises. The defendant became indebted to the United States for taxes on his distilled spirits, manufactured in this distillery, and for his deficient returns, and for a capacity-tax on his distillery. Rogers was actually indebted to the United States, in the sum of \$1,613, for unpaid taxes alone on his distilled spirits, which, being greater than the amount for distribution, makes it unnecessary to consider the remaining portions of the claim of the government.

By the act of congress of 20th July, 1868, "imposing taxes on distilled spirits and tobacco, and for other purposes" (15 Stat. at Large, 125), it is enacted "that there shall be levied and collected on all distilled spirits, on which the tax prescribed by law has not been paid, a tax of fifty cents on each and every proof gallon, to be paid by the distiller, owner or person having possession thereof before removal from distillery warehouse; and the tax on such spirits shall be collected on the whole number of gauge or wine gallons, when below proof, and shall be increased in proportion for any greater strength than the strength of proof spirit as defined in this act; and any fractional part of a gallon, in excess of the number of gallons in a cask or package, shall be taxed as a gallon. Every proprietor or possessor of a still, distillery or distilling apparatus, and every person in any manner interested in the use of any such still, distillery or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures and tools therein, and on the lots or tracts of lands whereon the said distillery is situated, together with any building thereon, from the time said spirits are distilled until the said tax shall be paid."

The argument of the appellants is, that the sheriff could not sell the property, except subject to the lien of the government for the unpaid tax. In plain language, he could not give a title to the property sold by him as an officer of the law. If, therefore, he sold the articles levied upon in twenty-five different lots to twenty-five different persons for twenty-five different prices, would each lot be subject to the whole fixed lien, or how much of it?

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The case of *The Royal Saxon* is an answer to this argument. In *Taylor v. Carryl*, 20 How. 583, the supreme court of the United States held that, where property is levied upon, it is not liable to be taken by an officer acting under another jurisdiction. Speaking of a seizure by a sheriff under process from a State court, and a subsequent seizure of the same property by the marshal, under process against the same defendant, it is said: "The marshal or the sheriff, as the case may be, acquires a special property in the goods, and may maintain an action for them. *But if the same goods may be taken in execution by the marshal and the sheriff, does this special property vest in the one or the other, or both of them? No such case can exist*; property once levied upon remains in the custody of the law, and is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under another jurisdiction."

The sheriff having sold the property, under an execution from a State court, the distribution will be made by that tribunal, and, in so doing, it will recognize the unpaid tax on the distilled spirits as the first lien, and direct its payment accordingly. This has been done by the court below in the present case, following the precedent in the appeal of *The United States v. Black et al.*, from the decree of the court of common pleas of Cumberland county, the opinion in which case was filed at Pittsburg on the 19th October, 1869.

This, of course, reaches the claim of the landlord, the unpaid tax being made a first lien on the distilled spirits, the distillery used for distilling the same, the stills, vessels, fixtures and tools therein, from the time said spirits are distilled until the said tax shall be paid, which secures its first payment out of the proceeds of such sale.

"The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use or enjoyment; to every species of possession, and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property." Cooley on Constitutional Limitation, 479. The laws of the United States are supreme on all subjects to which the legislative power of congress extends.

Decree affirmed, and appeals dismissed at the costs of the appellants.

FULMER, plaintiff in error, v. SEITZ.

(68 Penn. St. 237.)

Promissory note — effect of alteration on liability of sureties.

A promissory note, not bearing interest, was signed by the principal maker and by the sureties, and delivered to the payee. Two months afterward, the payee, without fraudulent intent, and the sureties not being present, but by consent of the principal maker, added the words "Int. payable semi-annually." In an action on the note by the payee, *held*, that the alteration avoided it as to the sureties, and that, after going to trial, the payee could not be permitted to strike out the added words, and recover on the note in its original form. (*See note, p. 175.*)

ACTION on a promissory note by Henry Fulmer against George Seitz, Henry A. Sage, John A. Seitz and George H. Bender. The note was as follows:

"\$4,000.

EASTON, February 11, 1868.

"One year after date, we, or either of us, promise to pay, to the order of Henry Fulmer, four thousand dollars, without defalcation for value received. *Int. payable semi-annually.*

"GEORGE SEITZ,

"HENRY A. SAGE,

"JOHN A. SEITZ,

"GEO. H. BENDER."

The principal maker was George Seitz, the other signers were sureties. When the note was delivered, the words in italics, "Int. payable semi-annually," were not in the note. The opinion states the other facts sufficiently. Judgment for defendants. Plaintiff brought a writ of error to this court.

O. H. Meyers and *E. J. Fox*, for plaintiff in error. An alteration, leaving the effect of the instrument as it was before, is not material. *Miller v. Gilleland*, 19 Penn. 122. "Int. payable semi-annually," does not necessarily imply interest payable from the date of the note. 2 Phillip's Ev. 429; Edwards on Bills, 708, 712, 713; Byles on Bills, 227; Addison on Contracts, 1154; 2 Parsons on Contracts, 14; *Potter v. Gardner*, 5 Pet. 718; *Doman v. Dibden*,

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Ryan & Moody, 381; *Richards v. Richards*, 2 Barn. & Ald. 447; *Roffey v. Greenwell*, 10 Ad. & Ell. 222; *Powell v. Guy*, 3 Dev. & Batt. 70; *Kilgore v. Powers*, 5 Blackf. 22; *Billingsly v. Cahoon*, 7 Ind. 184; *Cooley v. Rose*, 3 Mass. 221; *Kennerly v. Nash*, 1 Stark. 368. The alteration being in accordance with the original agreement of the parties, their consent might reasonably be implied thereto, and such an alteration would not make the note void. 2 Parsons on Notes, 570; *Clute & Bailey v. Small*, 17 Wend. 238; *Boyd v. Brotherson*, 10 id. 93; *Jacob v. Hart*, 6 Maule & Selw. 142; Chitty on Bills, 206-209; *Kershaw v. Cox*, 3 Esp. 246; *Brutt v. Picard, Ry. & Moo.* 37; *Arnold v. Stedman*, 45 Penn. 189; *Kountz v. Kennedy*, 63 id. 187.

H. Green (with whom was *W. W. Schuyler*), for defendants in error. The alteration of an instrument avoids it without regard to the motive. *Marshall v. Gougler*, 10 Serg. & Rawle, 164; *Beary v. Haines*, 4 Whart. 20; *Henning v. Werkheiser*, 4 Penn. St. 518. The onus of showing a lawful alteration is on the holder. *Simpson v. Stackhouse*, 9 Penn. St. 186; *Kennedy v. Lancaster Co. Bank*, 18 id. 347; *Miller v. Gilleland*, 19 id. 119; *Pains v. Edsell*, id. 178; *Southwark Bank v. Gross*, 35 id. 80; *Hill v. Cooley*, 46 id. 259; *Neff v. Horner*, 63 id. 327; *Warrington v. Early*, 2 Ell. & Black. 763; *Dewey v. Reed*, 40 Barb. 16; *Woodworth v. Bank*, 19 Johns. 391; *Sutton v. Toomer*, 7 B. & C. 416; 2 Parsons on Bills, 549. Unless expressed otherwise in the note, interest commences from maturity. *Kennerly v. Nash*, 1 Stark. 368; 2 Parsons on Bills, 392; *Daggett v. Pratt*, 15 Mass. 177; *Ludwick v. Huntziner*, 5 W. & S. 51, *Warrington v. Early*, *supra*; *Miller v. Gilleland*, *supra*. It is immaterial what kind of understanding the defendants may have had as to what their contract was. The only question is what *was* the contract. *Kennedy v. Lancaster Co. Bank*, *supra*; *Perring v. Hone*, 4 Bing. 28; *Clute v. Small*, 17 Wend. 238. The change having been made, without the consent of the sureties, they are discharged. Theob. on Principal and Surety, §§ 152-166; *Hibbs v. Rue*, 4 Penn. St. 350; *Uhler v. Applegate*, 26 id. 140. As to the refusal to strike out the altered words. *Neff v. Horner*, *supra*.

AGNEW, J. (After disposing of a question of evidence.) The third and fourth assignments involve the principal question in the cause. According to the plaintiff's testimony, about two months

after the note in suit was delivered to him, George Seitz came to his house. He mentioned to Seitz that the note was non-interest bearing, and Seitz said: "You just add the words 'Int. payable semi-annually,' and it will be all right." He did so, in Seitz's presence. He also states that the agreement between him and Seitz, at the time of making the loan was, that Seitz should pay him 12 per cent interest, and that, in two or three weeks after the note was given, Seitz handed him \$240, the bonus part of the interest or six per cent on \$4,000, the principal of the loan. The alteration of the note, by the addition of interest, was a conceded voluntary act on part of the plaintiff, though not fraudulent or wrongful as to George Seitz, the principal, and the question is, whether this act avoided the note as to the sureties. The case is, we think, ruled by *Neff v. Horner*, 63 Penn. St. 327, 3 Am. R. 555, which is in turn supported by the additional authorities cited by the defendants in error in this case. There is no difference between this case and that, excepting that, if any thing, this is stronger against the plaintiff than that. There, the alteration was made by the principal defendant himself, stating, at the same time, that he was authorized to make the alteration by the defendants; while here, the alteration was made by the plaintiff himself, and the principal defendant merely said it would be right, but did not say he was authorized to have it done. The grounds for the decision in *Neff v. Horner* are stated in the opinion, and need not be repeated here. But it is supposed that the case of *Kountz v. Kennedy*, 63 Penn. St. 187, 3 Am. R. 541, is opposed to this view, and it is cited as authority against it.

That case is a very close one, and was decided doubtfully on its peculiar circumstances. One of our number expressly dissented, and I gave my own assent with hesitation. The case differs from *Neff v. Horner* and this case, in several material respects. There, the plaintiff did not sue for or claim the interest under the alteration. Here, and in *Neff v. Horner*, he did. In *Kountz v. Kennedy*, the evidence showed that the alteration was evidently the result of a misapprehension, and as soon as the plaintiff discovered that the indorser had not authorized it, he had it taken out so as not to deface the note. As between him and Hunt, the drawer of the note, there was no difference of understanding, the latter having agreed to pay interest, and the note being altered to that effect by his clerk, when the plaintiff discovered that it did not correspond with their understanding. The plaintiff never made any claim of interest

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against the indorser, and had acted without a suspicion even of intended fraud. It was therefore held that the indorser was not affected by any thing which had been done, the alteration being innocent and the correction being made immediately, as soon as it was discovered that he had not assented to the change. In the present case, the parties to the note were all drawers, and stood in the same precise relation to it, so that the alteration as to the principal was an alteration of the direct contract to pay the note of each and every one who signed it; and on this contract the plaintiff brought his suit and insisted on his right to recover interest against all. Failing to show his right to recover against them, because of his failure to prove their assent to the alteration, he fell directly within the rule of policy which forbids the recovery of any thing upon the altered instrument. These reasons furnish an answer also to the alleged error in refusing the plaintiff permission to strike out of the note and out of the *narr.* the added words, "Int. payable semi-annually." One who makes a voluntary and unauthorized alteration of a written contract, and insists upon it by going to trial to recover upon the altered state of the instrument, has no *locus penitentiae*, which, on his failure to establish his right to recover, will enable him to undo the wrong at the trial, and to stand as one who has made an innocent mistake, and never has insisted upon his right to enforce it.

The sixth, seventh and eighth errors may be considered together. There is no evidence that the loan itself was made to all the drawers of the note directly either as principals or sureties, or that any undertaking was assumed by the sureties, other than the promise contained in the note itself. Nor did they receive any of the money lent by the plaintiff. Their liability arose, therefore, wholly upon the note, and not upon any express or implied promise, outside of it, to repay the money lent. It is evident, therefore, there was no ground upon which the court could submit to the jury the right of the plaintiff to recover jointly from all of the defendants the money lent, independently of the instrument by which the sureties bound themselves to pay it, and on that, as an altered writing, we have seen there can be no recovery. Upon the whole case we discover no error, and the judgment is, therefore,

Affirmed.

NOTE. — See *Wallace v. Jewell*, ante, p. 48; also *Holmes v. Trumper*, 7 Am. R. 661 and note, p. 663. — REP.

EILBERT, plaintiff in error, v. FINKBEINER.

(68 Penn. St. 242.)

Promissory note — indorsement — parol evidence — guaranty.

Defendant put his name on the back of a negotiable promissory note, the payee not having indorsed it, and subsequently wrote letters to the payee stating that if the maker did not pay the note he (defendant) would pay it. In an action by the payee, *held*, that although, in the absence of legal evidence, the position of defendant was that of second indorser, yet the letters were admissible in evidence to prove that the agreement upon which the indorsement was made was a guaranty that the note should be paid to the payee (*See note, p. 178.*)

ACTION on a promissory note by Gottlieb Eilbert against Michael Finkbeiner. The note was as follows :

"\$100.

PHILADELPHIA, July 19, 1867.

"Six months after date I promise to pay, to the order of Gottlieb Eilbert, one hundred dollars, value received, with eight per cent interest.

"HENRY FINKBEINER,

"No. 1340 Girard avenue, Philadelphia, Pa.

(Indorsed)

"MICHAEL FINKBEINER."

At the trial, plaintiff offered letters written to him by defendant which contained promises to pay the note if Henry (his son) did not pay it. These letters were excluded. Other offers of evidence were excluded, but they are not material. Verdict for defendant. Plaintiff took out a writ of error.

R. J. Jones (with whom was *H. S. Hartrift*), for plaintiff in error.

E. J. Fox, for defendant in error.

SHARSWOOD, J. Nobody ever doubted that when a man puts his name on the back of negotiable paper before the payee has indorsed it, he means to pledge, in some shape, his responsibility for the payment of it. *Kyner v. Shower*, 13 Penn. St. 446. This court finally

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settled that, in the absence of legal evidence of any different contract, he assumes the position of a second indorser; and that, to render his engagement binding as to any holder of the note, the implied condition that the payee shall indorse before him must be complied with so as to give him recourse against such payee. *Schafer v. The Farmers and Mechanics' Bank*, 59 Penn. St. 144. Prior to January 1, 1856, when the act of April 26, 1855 (Pamph. Laws, 308) went into effect, it could have been shown by parol evidence that the intention of the irregular indorser was to guarantee the payment of the note to the payee. *Leech v. Hill*, 4 Watts, 448; *Taylor v. McCune*, 11 Penn. St. 460. The act of 1855, by providing that no action shall be brought "whereby to charge the defendant upon any special promise to answer for the debt or default of another, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him authorized," made parol evidence of such a guaranty unlawful. *Jack v. Morrison*, 42 Penn. St. 113. But surely under the statute a memorandum in writing signed by the party is admissible to show that the agreement upon which the indorsement was made was a guaranty that the note should be paid to the payee; and not that the payee should stand between the indorser and ultimate responsibility. Now the letters which were offered in evidence and rejected by the court were clearly of this character. They were addressed to Eilbert the payee, and acknowledged the writer's liability to him on the loan which he had made to his son Henry, the maker of the note, on July 19, 1867, which is its date; so that the identity of the transaction referred to with the note in suit is beyond all doubt. He promises to pay if Henry does not. Had these letters been addressed to a subsequent holder, it might have been supposed that the acknowledgment of liability was a mistake in law, since without Eilbert's indorsement he would not be liable to such subsequent holder. But the acknowledgment here being to Eilbert, the payee, there could have been no mistake. He admits a liability to Eilbert, the payee, himself, which is entirely inconsistent with the notion that he had put his name on the back of the note upon condition that Eilbert should take the position of first indorser. Moreover, these letters contain a promise to pay upon the consideration of forbearance—not to cause any further costs; and, as an independent original contract would have been admissible under the special declaration, and would have

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entitled the plaintiff to a verdict unless some defense were made out.

(The judge here disposed of several unimportant questions of evidence.)

NOTE. — For the liability of one not a party, who writes his name on the back of a negotiable promissory note, see note to *Jones v. Goodwin*, 2 Am. R. 473. — REP.

EMPIRE TRANSPORTATION Co., plaintiff in error, v. WALLACE.

(68 Penn. St. 302.)

Common carrier — delay in transportation.

Plaintiff shipped goods at Irvineton, Penn., to be transported to Boston by defendants, common carriers, and received a bill of lading, containing a condition that "this merchandise may be carried in box cars, covered skeleton cars, or open platform cars; if destined beyond Philadelphia, it may be transported by water, in vessels, boats, barges or lighters, and if so destined to any point beyond, the same may be intrusted or delivered in the cars of this company, or otherwise, to any other railroad or transportation company or agent," etc. The usual route of defendants was by rail to Philadelphia, and thence by water to Boston. *Held*, that defendants were not bound to send the goods by rail from Philadelphia, when there was a temporary obstruction in the water communication.

ACTION by Alexander Wallace against the Empire Transportation Company for damages arising from delay in transporting a quantity of petroleum. The oil was shipped at Irvineton, Penn., consigned to Barney, Spencer & West, at Boston. The bills of lading contained the following conditions:

"2. This merchandise may be carried in box cars, covered skeleton cars, or on open platform cars; if destined beyond Philadelphia, it may be transported by water, in vessels, boats, barges or lighters, and if so destined to any point beyond, the same may be intrusted or delivered in the cars of this company, or otherwise, to any other railroad or transportation company or agent; and such railroad or transportation company or agent so selected shall be regarded exclusively as the agent of the owner or consignee, and shall be entitled to the benefit of the conditions and provisions of this, and of such bill of lading as they may deliver therefor; and the Empire Trans-

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portation Company shall not be, in any event, responsible for the negligence or non-performance of any such company or agent, nor shall such company or agent be liable for any loss or injury except upon its or their respective routes, and while such merchandise is in their respective custody.

"3. That the owner or consignee (in consideration of the extremely hazardous nature of such merchandise, which is not covered by any extra charge for transportation) hereby assumes all risk from leakage, evaporation and loss by fire, while in transit, or at depots, or in stations, or on board boats, vessels or lighters, from any cause whatever, and all dangers and delays of railroad and water transportation to point of destination, and in any claim or demand, suit at law or equity, against this company or transportation company or agent, for loss or damage thereby, this bill of lading shall be deemed and taken as a release in full therefor."

It appeared that the established route of defendants was by rail to Philadelphia, and thence by water to Boston. The delay in transportation complained of occurred at Philadelphia. Defendants alleged that it was on account of ice in the river. Plaintiff maintained that it was defendants' duty to forward the oil by rail in case of obstruction in the water communication. The judge charged that defendants were bound to send the oil by rail under such circumstances; and the jury found a verdict for plaintiff. Defendants brought a writ of error.

J. R. Clark, for plaintiffs in error.

R. Brown, for defendant in error.

SHARSWOOD, J. It is well-settled elementary law that, in the absence of any special contract, the obligation of a carrier of goods is to transport them by the usual route proposed by him to the public, and to deliver them within a reasonable time. This rule applies as well where he confines his undertaking to the route of his own carriage, as where he extends it to forward goods to points beyond. He must use reasonable expedition, but is not bound to extraordinary exertions or to incur extra expense, in order to surmount obstacles not caused by his own default, but by the weather or other act of providence. Redf. on Car., §§ 210, 220, 302, 304, 305.

The contract between the parties in this suit was contained in the

bill of lading, as it is termed, or receipt for transportation. It did not, by any special stipulations, vary the extent of the legal obligations resting upon the carriers receiving goods to be transported to Boston, a point beyond their own line. It fully appeared that the established route of the defendants below was by railroad to Philadelphia, and from thence by water to Boston. It is true, the transportation company were not absolutely bound to this route beyond Philadelphia. They had the option to send the goods forward, either by water, in vessels, boats, barges or lighters, or by any railroad or transportation company, or agent. There was certainly nothing in this option to render it incumbent upon the carriers to send the goods by railroad whenever there was any obstruction of the communication by water. There was nothing in it which gave the plaintiff any right to suppose that the goods would be delivered in Boston without any unnecessary delay, and that if they could not be immediately sent on by water, they would be sent by rail. Obstructions by ice in the river are, in their nature, merely temporary, and of very uncertain duration. They rarely last longer than one or two weeks, and the ice may break up and disappear so as to re-open navigation in twenty-four hours. It had been expressly stipulated that the owner or consignee should assume all risk from dangers and delays of railroad and water transportation, to point of destination. The defendants below were not bound to incur the extraordinary expenses of sending the oil on by railroad, because it happened that the Delaware river was so obstructed by ice at or immediately after the article arrived in Philadelphia, as to prevent their obtaining vessels for the purpose. That this expense would have been extraordinary, appeared by the testimony of Henry F. Spencer, a witness whose deposition was taken on behalf of the plaintiff below, and read by him on the trial, who, by the plaintiff's authority, received the oil at Philadelphia, from the hands of the defendants below. He said: "I sold it in Philadelphia, and did not ship it to Boston, because the river was closed, and it would have been very expensive to have sent it by rail from there." It was very properly submitted by the learned judge below to the jury, to say, as a question of fact, whether there was negligence causing unnecessary delay, in the company not sending the oil forward as soon as possible after its arrival in Philadelphia, if the river was not frozen up so as to prevent vessels from leaving for some six to eight days after that. Had the learned judge rested there it would have been perfectly right, for

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there certainly was evidence sufficient to justify that submission. But after thus submitting this question, the learned judge went much further, and in effect took the case back from the jury, when in his answers to the points, and in his charge, he instructed them that if the defendants could not, for any providential reason beyond their control, send on the merchandise by water, they were bound to send it by railroad, and that, not having done so, they were responsible to the plaintiff for the loss he had sustained by the fall in the market during the delay. In this we think there was error.

Judgment reversed, and venire facias de novo awarded.

 PIDCOCK, plaintiff in error, v. POTTER.

(68 Penn. St. 342.)

Will — mental unsoundness. Evidence.

Partial unsoundness of mind not affecting the general faculties, and not operating on the mind of a testator, in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will. After a non-professional witness has stated the facts upon which his opinion is founded, he may be permitted to state his opinion as to the sanity or insanity of a testator. (*See note, p. 184.*)

ISSUE under a precept to try whether a certain paper writing was the will of Ozias Potter. The paper was dated March 27, 1869, and the issue was framed between Bulina Pidcock and Sarah Pidcock, plaintiffs, and Ella R. Potter, defendant. The opinion sufficiently states the case. The verdict was for the defendant. The plaintiffs took out a writ of error.

S. T. & H. C. McCormick and B. S. Bentley & Son, for plaintiffs in error, cited 1 Redf. on Wills, 101, and note, 104, 105; *Logan v. McGinnis*, 12 Penn. St. 31; *Pool v. Richardson*, 3 Mass. 330; *Titlow v. Titlow*, 54 Penn. St. 216; *Dickinson v. Barber*, 9 Mass. 225; *Moritz v. Brough*, 16 Serg. & Rawle, 403; *Kachline v. Clark*, 4 Whart. 319; *Stevenson v. Stevenson*, 33 Penn. St. 471; *Harden v. Hays*, 9 id. 156; *McMasters v. Blair*, 29 id. 302.

H. C. Parsons, W. H. Armstrong and Linn, for defendant in error, cited Whart. & Stille's Med. Juris., p. 20, § 17; *Tillow v. Tillow*, 54 Penn. St. 216; *Dickinson v. Dickinson*, 61 id. 401; *Wogan v. Small*, 11 Serg. & Rawle, 141; *Norris v. Sheppard*, 20 Penn. St. 477; *Rambler v. Tryon*, 7 Serg. & Rawle, 90; *Irish v. Smith*, 8 id. 581.

READ, J. Insanity and its treatment have, of late years, been the subject of close and accurate scientific investigation, which has modified some of the doctrines laid down by eminent judges, or, rather, their application to particular cases. Insanity is a disease which may be either general or partial, and the opinion of Lord BROUGHAM, in *Waring v. Waring*, in the Privy Council, July 17, 1848, in relation to partial insanity or monomania, and approved by Lord PENZANCE, in *Smith v. Tebbitt*, 36 L. J. R. N. S., Probate Court, 97, Aug., 1867, has been shaken, if not overruled by the court of queen's bench, in *Ranks v. Goodfellow*, 39 L. J. R. N. S., Q. B., 237; L. R., 5 Q. B. 54, on the 6th of July, 1870, Lord Chief Justice COCKBURN delivering the opinion of the court. The opinion is a very learned and elaborate one, citing the opinions of foreign text writers, and, also, American decisions, and holding that partial unsoundness, not affecting the general faculties, and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will, and this seems to be the opinion of Dr. Ray, in his *Treatise on the Medical Jurisprudence of Insanity* (5th ed.), 1871, §§ 302, 303.

If unsoundness of mind is proved to exist on the day that the will is made, or on the day the instructions are given, it is certainly permissible to trace the unsoundness both before and after that period, up to the very moment of the decease of the alleged testator. This necessarily opens a wide door to the admission of evidence; subscribing witnesses, of course, testify to the state of the testator's mind, and, in addition to the facts, give their opinion. The same is the case with medical men who, as experts, may give their opinion upon hypothetical cases, or upon the facts proved. 1 Greenleaf's Ev., § 440. In Pennsylvania, it has always been the rule, that after a non-professional witness has stated the facts upon which his opinion is founded, he is permitted to state his opinion as to the sanity or insanity of the testator. 1 Redfield on Wills, 141. From *Rambler v. Tryon*, 7 S. & R. 90, decided by Judge DUNCAN in 1821, and *Wogan v. Swall*, 11 S. & R. 141, decided by Chief Justice TILGHMAN in 1824,

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to *Titlow v. Titlow*, 54 Penn. St. 216, in 1867, and *Dickinson v. Dickinson*, 61 id. 401, in 1869, our decisions have been uniform on this point.

Ozias Potter had a wife and an adopted daughter, whom he had taken in 1861, when she was a little girl, and to both of whom he was affectionately attached. He had been in business with Mr. Wonderly, under the firm of Potter & Co., which appears to have existed, in some shape or form, up to the time of his death, on the 6th of September, 1869.

His will was drawn by General Robert Fleming, and is dated the 27th March, 1869. The instructions were given by the decedent to General Fleming, on Good Friday, the 26th of March, in the evening, in the bed-room, no other person being present. The will was drawn in General Fleming's office, and was executed the next evening, Mr. Weiss and the general being the witnesses. Neither the wife nor daughter ever knew of this will, the existence of which was known only to the witnesses. From the testimony of Dr. Richter, the attending physician, it is clear that he was entirely unfit to make a will, in which he is supported by the direct and positive testimony of Mrs. Potter.

In 1863, Mr. Potter had a severe attack of small-pox, which shook his constitution, and evidently impaired both mind and body, and changed his character. In 1867, he was afflicted with the heart disease, which gradually increased, affected his brain, and finally terminated his life. About March, 1867, he made a will, the contents of which were proved by General Fleming, who drew it, Mr. Wonderly, and others. This will provided amply for his wife and daughter, and was made with a full knowledge of the value of his property, and this is the only will any one knew of, excepting the witnesses to that of the 27th of March, 1869. He ceased transacting any business in August or September, 1868, and his condition is traced up till he went south, on the 27th of January, 1869, accompanied by Mr. Wonderly, to take care of him, and returned the 9th of February, 1869, not improved; and his disease, with dropsy on the chest, had a powerful effect upon the brain. His mind became filled with visionary speculations, demanding large capital, and the supposed ownership of property that did not belong to him. He often spoke of his will, describing its provisions as in that of 1867, and never in any way alluding to that of the 27th of March, 1869, as if he had entirely forgotten its execution. The evidence of

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the medical witnesses, and of the others who knew Mr. Potter well, was very strong in proving that he was incompetent to make a will on the 27th of March, 1869. Mr. Potter's property was a little over \$30,000, and he ordered at least \$2,000 to be expended in purchasing a suitable lot in a cemetery (having one already), and to erect thereon a suitable monument. He gives his wife their residence during her natural life, his household and kitchen furniture, and \$1,500 during her natural life. If she claims her dower, these bequests to be null and void. *He never even names his daughter Ella.* To Bulina and Sarah Pidcock he gives a house and lot during their natural lives. To said Bulina and Sarah, each \$400 per annum, during the natural life of each. For the purpose of paying these annuities, amounting to \$2,300 per annum, and \$400 per annum as a compensation to said trustee, he directs a sum to be paid him, to be invested to produce those sums. The residue of his estate he gives to the city of Williamsport, for the benefit of their poor.

Mr. Smith, the trustee, renounced the legacy to him, and the city of Williamsport treated theirs in a similar way.

It was a cruel and unjust will, and the first and last provisions, for the monument and the poor, were perfectly absurd in view of the small estate he died possessed of.

The learned judge delivered a very clear and sensible charge to the jury. He affirmed the plaintiffs' third, fourth, fifth and seventh points, and as the plaintiffs must have known was his duty, he negatived the first point. The second and sixth points were properly answered. Whatever, therefore, is assigned for error, either as to these points or as to the charge, is not sustained. These remarks dispose of the twelfth and thirteenth errors assigned.

The first ten errors assigned are disposed of by the remarks already made, and, as to the eleventh error, the court were right in rejecting evidence of general reputation.

I submitted the paper-books to Dr. Isaac Ray, who has favored me with a most careful analysis and review of the facts of this case, and thus closes it with these words: "In view of all these facts, I cannot avoid the conclusion that, in March, 1869, Ozias Potter did not possess 'a sound and disposing memory.'"

Judgment affirmed.

NOTE.—In *State v. Pits*, 6 Am. R. 533, the majority of the supreme court of New Hampshire held, that witnesses not experts cannot give their opinion on the question of sanity. To this doctrine Don. J., dissented in a very elaborate opinion. See 6 Am. R. 544.

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The most valuable judicial contribution made in a number of years, to the subject of testamentary capacity, is the opinion of the court of Queen's Bench, in *Banks v. Goodfellow*, 23 L. T. R. N. S. 813; 30 L. J. R. 237, decided in 1870. The opinion presents such an exhaustive review of the whole subject that we make no apology for giving it in full:

COCKBURN, C. J., delivered the judgment of the court (COCKBURN, C. J., BLACKBURN MELLOE and HANNON, JJ.), July 6, as follows:

This is an action brought by the plaintiff, as heir at law of John Banks, to try the validity of a will made by the latter in favor of one Margaret Goodfellow, of whom, she having died since the decease of the testator, defendant is the heir. The question in issue at the trial was the capacity of the testator to make a will. Instructions for the will taken by the attorney who prepared it were signed by the testator, and attested by witnesses in his presence, on the 2d December, 1863. The will formally prepared from such instructions was duly executed on the 27th of the same month. The question is, whether on both or either of those days the testator was of sound mind, so as to be capable of making a will. It is a fact beyond dispute that the testator John Banks had, at former times, been of unsound mind. He had been confined, as far back as the year 1841, in the county lunatic asylum. Discharged after a time from the asylum, he remained subject to certain fixed delusions. He had conceived a violent aversion toward a man named Featherstone Anderson, and, notwithstanding the death of the latter some years ago, he continued to believe that this man still pursued and molested him, and the mere mention of Featherstone Alexander's name was sufficient to throw him into a state of violent excitement. He frequently believed that he was pursued and molested by devils or evil spirits, whom he believed to be visibly present. Besides these delusions, which were spoken to by two witnesses whose evidence was above suspicion, the one a medical man who attended him to the end of 1862, and the other the clergyman of the parish in which the testator resided, there was a body of evidence which, if believed, was strong to establish a case of general insanity. The jury, however, found in favor of the will, and, therefore, must have believed this evidence to be greatly exaggerated, or must have come to the conclusion that the will was made during a lucid interval. From September, 1863, he had a succession of epileptic fits, and a blister was applied to his head, and the medical man who attended him throughout this period deposed that his mental power, such as it was, suffered from the fits, and that he considered him insane and incapable of transacting business during the whole time. On the other hand, it appeared that the testator managed his own money affairs, which, however, were on a limited scale, and was careful of his money.

According to the evidence of a witness named Tolson, who had acted as his agent in receiving the rents of some cottage property at Keswick, amounting to about £20 a year the testator had not only always showed himself capable of transacting business with him, but had, on the last occasion of Tolson's coming to pay the rents, suggested to him to take a lease of the cottages in question, so as to relieve him (testator) from all risk or trouble in the matter. He had also desired Tolson, when he came to pay over the next half-year's rents, to bring with him a Mr. Ansdell, an attorney of Keswick, as he wanted to see him about making a will. On the 2d December, 1863, Tolson went to Arkleby, where testator lived, taking Ansdell with him. On their arrival, the testator, according to the statement of Ansdell and Tolson, told Ansdell he wished to make his will. He fetched from his room a will which he had made in 1838, in favor of his sister, who had since died, and said he wished to give his property to his niece, Margaret Goodfellow, in the same way. On Mr. Ansdell asking who should be the executors, testator turned to his niece, who was present, and asked who she thought should be executors; whereupon, she desired that Tolson should be one, and asked who should be the other, when the other executor, Milwall, was named by a person present, and assented to by testator. The instructions thus received by Ansdell were put down by him on paper, and, having been read over to the testator, were, by the desire of Ansdell, signed by him; and his signature was formally attested by two witnesses, so as to make the paper a sufficient and valid will, although it was intended that a more formal document should afterward be prepared and executed: the reason given by Ansdell

for such signing and attestation of the instructions being, that he always pursues this course when his clients live at a distance from him, and time would be required between the taking the instructions and the final completion of the will. The distance between Keswick and Arkleby is about twenty miles, and the road was said to be bad. After the matter of the will had been disposed of, a conversation took place concerning the proposed lease to Tolson. The testator calculated the amount of the rents, and, finding that they came to £80, offered a lease of the cottages for seven years at a rent of £76 a year. This being agreed to by Tolson, Ansdell was instructed to prepare a lease on these terms, and the instructions having been reduced to writing, were signed by the testator and Tolson. After this Tolson proceeded to settle with the testator for the rents received by him, which amounted to £4 7s. 4d. Of this Tolson produced £29 in cash, and offered his check for the remainder; but the testator observed that a check would be of no use to him, as there was no bank near, and desired Tolson to pay the balance into a bank at Keswick, at which Tolson had an account. After this a conversation ensued with a Mrs. Routledge, at whose house the testator lodged, as to the amount which he should pay her weekly for his board and lodging combined, which, if truly reported, tended strongly to show that he was certainly then capable of managing his affairs. On the 27th December, Tolson took over the will and lease, which had been prepared by Ansdell, to the testator, who, having read them two or three times, said they were all right, after which both instruments were executed by testator, and the will was duly attested. The testator lived till July, 1865. His niece, Margaret Goodfellow, survived him, but died in 1887, under age and unmarried. She was his heir at law. He had other nephews and nieces to whom he is said to have been much attached. The effect of the will, if valid, is that the property goes to the defendant, who is no relation in blood to the testator, as the heir at law of Margaret Goodfellow, instead of to any relative of the testator. This possible consequence of Margaret Goodfellow dying without issue and intestate does not, however, appear to have presented itself to the mind of any of the parties at the time of making the will. Upon this evidence the learned judge left it to the jury to say "whether, on the 2d December, 1863, or on the 27th December, 1863, or on both, the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions and free from delusions, as would enable him to have a will of his own in the disposition of his property, and act upon it;" the learned judge telling the jury that "the mere fact of his being able to recollect things, or to converse rationally on some subjects, or to manage some business, would not be sufficient to show he was sane; while, on the other hand, slowness, feebleness and eccentricities would not be sufficient to show he was insane," with the further direction that "the whole burden of showing that the testator was fit at the time was on the defendant." The jury returned a verdict for the defendant, saying that they found that the will "was a good and valid will."

The present rule was applied for and obtained on two grounds. First. That the judge misdirected the jury. Secondly. That the verdict was against the weight of the evidence. The alleged misdirection is, that the learned judge, in leaving to the jury the question whether, at the time of making the will, the testator was free from delusion, did not proceed to tell them that, though the delusions, under which the testator had undoubtedly before labored, might not have been present to his mind at the time of making the will, yet, if they were latent in his mind, so that if the subject had been touched upon the delusions would have recurred, the testator was of unsound mind and therefore incapable of making a will. We must take it for the present purpose as a fact, that the testator, though generally of weak intellect, was able to manage his own affairs, and, apart from the delusions under which he labored, was, at all events, at the time of executing one or both of the testamentary instruments in question, of sufficient testamentary capacity. We must also take it that no delusion manifested itself at the time of making the will. On the other hand there is ample proof that the delusions existed in the interval between the making of the will and the death of the testator, as they had done before; and it is, therefore, quite possible that these delusions may have remained at the time of making the will, unsound and latent

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in the testator's mind, and capable of being evoked and reproduced at any moment, if any thing had occurred to lead his thoughts to the subject.

The inquiry not having been directed to this point, it is quite possible that all that the jury meant in finding in the affirmative of the question whether the testator was "free from delusions" at the time of making his will was, that the delusions were not present to his consciousness, nor that they were eradicated from his mind, and that if the question had been specifically put to them, whether the delusions still remained latent in the testator's mind, and his mind was to the extent of these delusions unsound, they would have found in the affirmative.

It therefore becomes necessary to consider how far such a degree of unsoundness of mind as is involved in the delusions under which the testator labored would be fatal to testamentary capacity; in other words, whether delusions arising from mental disease, but not calculated to prevent the exercise of the faculties essential to the making of a will, or to interfere with the consideration of the matters which should be weighed and taken into account on such an occasion, and which delusions had in point of fact no influence whatever on the testamentary disposition in question, are sufficient to deprive a testator of testamentary capacity, and invalidate a will.

We must assume, for the present purpose, that the testator labored under the insane delusions ascribed to him; but on the other hand, that these delusions had not, nor were calculated to have, any influence on him in the disposal of his property, and that, irrespective of the delusions, the state of his mental faculties was such as to render him capable of making a will. For whatever may have been the evidence as to general insanity, the verdict of the jury, which there is ample evidence to support, and in which the learned judge who presided at the trial states that he concurs, establishes that at the time of making the will, irrespective of the delusions referred to, the testator was sufficiently in possession of his faculties. The question whether partial unsoundness not affecting the general faculties, and not operating on the mind of testator in regard to the particular testamentary disposition, will be sufficient to deprive a person of the power of disposing of his property, presents itself in the present case for judicial decision, so far as we are aware, for the first time. It is true that, in the case of *Waring v. Waring*, 6 Moo. P. C. Cas. 341, the judicial committee of the privy council, and in the more recent case of *Smith v. Tebbitt*, 1 L. Rep. P. and D. 398; 16 L. T. Rep. (N. S.) 841, Lord PENZANCE, in the court of probate, have laid down a doctrine according to which any degree of mental unsoundness, however slight and however unconnected with the testamentary disposition in question, must be held fatal to the capacity of a testator. But, in both those cases, as we shall presently show, the wide doctrine embraced in the judgments was wholly unnecessary to the decision, and we, therefore, feel ourselves warranted, and, indeed, bound to consider the question as one not concluded by authority, and on which we are called upon to form our own judgment. The question is one of equal importance and difficulty, and we have given it our best attention. The text writers throw no light upon the point. They content themselves with stating, in general terms, that, to be capable of making a will, a man must be of sound disposing mind and memory, and that persons *non compos* cannot make a will; but they are silent as to the degree of mental disturbance which will amount to want of a disposing mind and memory. The cases prior to *Waring v. Waring* (*ubi sup.*), in which the law on the subject of mental unsoundness, as affecting the capacity to make a will is considered, are by no means numerous. It may be as well to pass them in review. In *Combe's Case*, Moo. 759; 8 Vin. Abr. 43, No. 22, it is said to have been agreed by the judges, "That sane memory for the making a will is not at all times when the party can answer to any thing with sense, but he ought to have judgment to discern, and to be of perfect memory, otherwise the will is void." So, again, in the *Marquis of Winchester's Case*, 6 Rep. 23: "By the law it is not sufficient that the testator be of memory when he makes the will to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his estate with understanding and reason."

In the case of *Greenwood v. Greenwood*, 3 Curt. App., an action brought to recover estates under a will, the validity of which was disputed, the principal indication of insanity relied on being a strange aversion on the part of the testator toward his only

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brother, his heir at law, and a groundless suspicion of the latter having attempted to poison him, Lord KENYON, in charging the jury, said: "I take it, a mind and memory competent to dispose of his property, when it is a little explained, perhaps may stand thus: Having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wished to dispose of it. If he had a power of summoning up his mind so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make his will."

In other cases, such as the well-known case of *Dew v. Clark*, 3 Add. 97; Hagg. Rep. of Judgment, 19, the insane delusion had a direct bearing on the provision of the will. In such cases, the delusion being once proved, and its connection with the will being manifest, there could be no difficulty in setting aside the will. Cases of this description afford little or no assistance toward the solution of the question before us.

Again, other cases occurring prior to the case of *Waring v. Waring*, such as the *Attorney-General v. Parnter*, 3 Bro. C. C. 441, and *Cartwright v. Cartwright*, Phil. 90, had reference to the effect to be given to a lucid interval at the time of making the will rather than to the degree of mental unsoundness which would constitute testamentary incapacity. The judgment in the latter case is, however, not unworthy of attention. The case was a remarkable one, from the fact that the will had been made by a person actually confined in a lunatic asylum, and was undoubtedly insane both before and after the making of the will; nevertheless, it was upheld. Sir William WYNN, the then judge of the prerogative court of Canterbury, in giving judgment, uses language tending strongly to show that, in his opinion, the rationality of the act done affords an effectual test of the mental capacity of the party doing it. He says: "I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself. That I look upon as the thing to be first examined, and, if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? Because, suppose you are able to show the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further, and the citation from Swinburne states it to be so. The manner he has laid it down is (it is in the part in which he treats of what persons may make a will, Swinburne, part 2, § 3), says he, the last observation is: 'If a lunatic person, or one that is beside himself at some times, but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of phrenzy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions, and so the testament shall be adjudged good. Yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet, nevertheless, I suppose that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.'

"Unquestionably," Sir William WYNN continues, "there must be a complete and absolute proof that the party who had so framed it did it without any assistance. If the fact be so that he had done as rational an act as can be without any assistance from another person, what there is more to be proved I don't know, unless the gentlemen could prove by any authority or law what the length of the lucid interval is to be, whether an hour, or a day, or a month. I know no such law as that; all that is wanting is that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient." Without going the length of adopting to its full extent what is here said as to the effect of the rational character, or, at all saying that effect can be given to the rationality of the disposition beyond that which is due to it as evidence of the sanity of the testator, we advert to this case and the judgment of Sir William WYNN, as showing that a more indulgent view of insanity as affecting testamentary incapacity was then taken than has latterly prevailed. We come to the case of *Waring v. Waring* (*ubi sup.*), since followed by that of *Smith v. Tebbit* (*ubi sup.*), in which

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the doctrine now contended for on behalf of the plaintiff was for the first time laid down. It may be shortly stated thus: To constitute testamentary capacity, soundness of mind is indispensably necessary; but the mind, though it has varied faculties, is one and indivisible; if it is disordered in any one of these faculties, if it labors under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound; such a mind is unsound, and testamentary incapacity is the necessary consequence. As has already been observed, neither in *Waring v. Waring*, nor in *Smith v. Tebbel*, was the doctrine thus laid down in any degree necessary to the decision. Both these were cases of general, not of partial, insanity. In both, the delusions were multifarious, and of the widest and most irrational character, abundantly indicating that the mind was diseased throughout. In both there was an insane suspicion or dislike of persons who should have been objects of affection, and, what is still more important, in both it was palpable that the delusions must have influenced the testamentary disposition impugned. In both these cases, therefore, there existed ample grounds for setting aside the will without resorting to the doctrine in question. Unable to concur in it, we have felt ourselves at liberty to consider for ourselves the principle properly applicable to such a case as the present. We do not think it necessary to consider the position assumed in *Waring v. Waring*, that the mind is one and indivisible. It is not given to man to fathom the mystery of the human intelligence, or to ascertain the constitution of man's sentient and intellectual being. But, whatever may be the essence, every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organization. The instincts, the affections, the passions, the moral sense, perceptions, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease and the experience of insanity in its various forms teach us that while on the one hand all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed; that while the mind may be overpowered by delusions which utterly demoralize and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions which, though the offspring of mental disease, and so far constituting insanity, leave the individual, in all other respects, rational and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life.

No doubt, when delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound, just as the body, if any of its parts or functions is affected by local disease, may be said to be unsound, though all its other members may be healthy, and their powers or functions unimpaired. But the question still remains, whether such partial unsoundness, if it leaves the affections, the moral sense, and general power of the understanding unaffected, and is wholly unconnected with the testamentary disposition, must have the effect of taking away the testamentary capacity. We readily concede that where a delusion has had, as in the well-known case of *Dow v. Clark*, 3 Add. 79, and Haggard's report of the judgment, or is calculated to have an influence on the testamentary disposition, it must be held fatal to its validity. Thus, if as occurs in a common form of monomania, a man is under a delusion that he is the object of persecution or attack, and makes a will in which he excludes a child for whom he ought to have provided, though he may not have adverted to that child as one of his supposed enemies, it would be but reasonable to infer that the unsound condition had influenced him in the disposal of his property. But, in the case we are dealing with, the delusions must be taken neither to have had any influence on the provisions of the will, nor to have been capable of having any; and the question is, whether a delusion thus wholly innocuous in its results, as regards the dispositions of the will, is to be held to have had the effect of destroying the capacity to make one. The state of our own authorities being such as we have shown, we have turned to the jurisprudence of other countries, as on a matter of common judicial interest, to see

whether we could there find any assistance toward the solution of the question. We have, however, derived but little advantage from the inquiry. The Roman law, the great storehouse of judicial science, is as vague and general on the subject as our own. The madman (*furiosus*) and the person of deficient intelligence (*mente captus*) are declared incapable of making a testament; but as to what shall constitute madness or defectiveness of intelligence sufficient to prevent the exercise of the testamentary right the authorities are silent. The continental codes are equally general in their terms, providing simply either that persons must be of sound mind to make a will, or that persons of unsound mind shall be disabled from doing so. The older writers appear not to have been alive to the distinction between total and partial unsoundness as affecting testamentary capacity. In recent times, however, the question has been mooted by eminent and distinguished jurists, but, unfortunately, with a marked discordance of opinion. M. Troplong, in his great work, "*Le Droit Civil Explique*" (*Commentaire sur les donations entre-vifs et testaments*), volume I, sections 451-457, and N. Sacaze, in a remarkable treatise entitled "*La Folie considerée dans des Rapports avec la Capacité civile*" (p. 16), have adopted the doctrine of the unity and indivisibility of the mind, and the consequent unsoundness of the whole, if insane delusion anywhere exists, while writers, equally entitled to respect, have maintained the contrary view. Legrand du Saule, in a remarkable work entitled "*La Folie devant les Tribunaux*" (p. 146), contends that "hallucinations are not a sufficient obstacle to the power of making a will, if they have exercised no influence on the conduct of the testator, have not altered his natural affections, or prevented the fulfillment of his social and domestic duties; while, on the other hand, the will of a person affected by insane delusions ought not to be admitted if he has disinherited his family without cause, or looked on his relations as enemies, has accused them of seeking to poison him, or the like; in all such cases where the delusion exercises a fatal influence on the acts of the person affected, the condition of the testamentary power fails, the will of the party is no longer under the guidance of the reason, it becomes the creature of the insane delusion."

M. Demolombe, in his admirable work, "*The Cours de Code Napoleon*" (*Traite des donations entre-vifs et testaments*, lib. 3, tit. 2, s. 329), M. Castlenau, in his treatise, "*Sur l'Introduction des Alienes*," and Hoffbauer, in his celebrated work on medical jurisprudence, relating to insanity, have maintained the doctrine that monomania, or partial insanity, not affecting the testamentary disposition, does not take away the testamentary capacity. Mazzoni, in his recent work entitled "*Istituzioni di diritto civile Italiano*" (lib. 3, tit. 2, s. 8), lays it down that "monomania is not an unsoundness of mind which absolutely and necessarily takes away testamentary capacity, as the monomaniac may have the perfect exercise of his faculties in respect of all subjects beyond the sphere of his partial derangement." None of these writers, however, have gone very deeply into the subject, or considered it with reference to the principle on which mental alienation should be held to form a ground for taking away the capacity of testamentary disposition. The older jurists were content to say that an insane person was incapable of making a will because he had no mind "*quia mente caret*," as it is said in the Digest, or because he could not have a will, and therefore was incapable of declaring his ultimate will as to the disposal of his property, positions obviously unsatisfactory when the fact becomes recognized that a man may labor under harmless delusions which leave the other faculties of his mind unaffected and leave him free to make a disposition of his property uninfluenced by their existence. In our day the doctrine has sprung up of the unity and indivisibility of the mind; but the ground on which insanity should cause incapacity appears to have become overlooked in the reasoning on which it is founded. It may be important to recall it. The law of every civilized people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in his ultimate disposition of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given. The instincts and affections of mankind in the vast majority of instances will lead men to make provision for those who are the near-

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est to them in kindred, and who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed. The same motives will influence him in the exercise of the right which the law secures to him. Hence arises a reasonable and well warranted expectation on the part of a man's kindred surviving him, that on his death his effects shall become theirs, instead of being given to strangers. To disappoint the expectation thus created, and to disregard the claims of kindred to the inheritance, is to shock the common sentiment of mankind, and to violate what all men concur in deeming an obligation of the moral law. It cannot be supposed that in giving the power of testamentary disposition the law has been framed in disregard of these considerations. On the contrary, had they stood alone it is probable that the power of testamentary disposition would have been withheld, and that the disposition of property after the owner's death would have been uniformly regulated by the law itself. But there are other considerations which turn the scale in favor of the testamentary power. Among those who, as a man's nearest relatives, would be entitled to share the fortune he leaves behind, some may be better provided for than others; some may be more deserving than others; some from age, sex, or physical infirmity, may stand in greater need of assistance. Friendship and tried attachment, or faithful service, may have claims that ought not to be disregarded. In the power of rewarding dutiful and meritorious conduct, paternal authority finds a useful auxiliary; age secures the respect and attention which are one of its chief consolations.

As was truly said by KENT, C., in *Van Aist v. Hunter*, 5 Johns. (N. Y. Chan. Rep.) 159: "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attention due to his infirmities." For these reasons the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property, and there can be no doubt that it operates as a useful incentive of industry in the acquisition of wealth, and to thrift and frugality in the enjoyment of it. The law of every country has, therefore, conceded to the owner of property the right of disposing by will either of the whole, or, at all events, of a portion of that which he possesses. The Roman law, and that of the continental nations which have followed it, have secured to the relations of a deceased person, in the ascending and descending line, a fixed portion of the inheritance. The English law leaves every thing to the unfettered discretion of the testator, on the principle that though, in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence may lead to the neglect of claims that ought to be attended to, yet the instincts, affections and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law. It is unnecessary to consider whether the principle of the foreign law or that of our own is the wiser. It is obvious, in either case, that, to the due exercise of a power involving a moral responsibility thus grave, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power, that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will on disposing of his property, and bring about a disposal of it which would not have been made otherwise. But, we have here the measure of the degree of mental power which should be insisted on. If the human instincts and affections or the moral sense be perverted by mental disease, if insane suspicion or aversion take the place of natural affection, if reason and judgment are lost and the mind becomes a prey to insane delusions calculated to interfere with and

disturb its functions, and to lead to a testamentary disposition due only to its baneful influence, in such a case, it is obvious that the condition of testamentary power fails, and that a will made under such circumstances ought not to stand. But what if the mind, though possessing sufficient power undisturbed by frenzy or delusion to take into account all the considerations necessary to the proper making of a will, and producing a rational and proper will, should be subject to some delusions, but a delusion which neither exercises nor is calculated to exercise any influence on the particular disposition?

Ought we in such case to deny to the testator the capacity to dispose of his property by will? It must be borne in mind that the absolute and uncontrolled power of testamentary disposition conceded by the law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself. If, therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposition of property, why, it may well be asked, should it be held to take away the right? It cannot be the object of the legislator to aggravate an affection in itself so great by the deprivation of a right, the value of which is universally felt and acknowledged. If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind, is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will or place a person so circumstanced in a less advantageous position than others with regard to his rights. It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause, namely, from want of intelligence arising from defective organization, or from supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. It is enough if, to use the words of Sir Edward Williams, in his work on executors, if "the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done." "Non sanī tantum," says Voet in his Commentary on the Pandects, lib. 28, tit. 1, § 83, founding himself on Code, book 6, tit. 23, l. 15, "Sed et in agone mortis positi, seminece ac balbutiente lingua voluntatem promentes recte testamenta condant si modo mente adhuc valeant." This part of the law has been extremely well treated in more than one case in the American courts. In the case of *Harrison v. Rowan*, referred to in *Sloan v. Maxwell*, 2 Green, N. J. Ch. 570, in the United States circuit court for the district of New Jersey, the law was thus laid down by the presiding judge: "As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property. For most men, at different periods of their lives, have meditated upon the subject of the disposition of their property by will, and when called upon to have their intentions

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committed to writing, they find much less difficulty in declaring their intentions than they would in comprehending business in some measure new."

In a subsequent case of *Den v. Vanderve*, 2 South. 600, the law was thus stated: "By the terms, 'a sound and disposing mind and memory,' it has not been understood that a testator must possess these qualities of the mind in the highest degree, otherwise very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done, for even this would disable most men in the decline of life. The mind may have been in some degree debilitated, the memory may have become in some degree enfeebled, and yet there may be enough left clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory." In the same case it is said: "The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory. A man in whom this faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons or the faculties of those with whom he has been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator as this: Had he a disposing memory? was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole, in the most simple and intelligible form: Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?" This view of the law is fully adopted by the court, in the case of *Sloan v. Maxwell*, 2 Green's Ch. N. B., and is there stated to have been approved by VROOM, C., in a case of *Tace v. Wallace*, id., which, however, is not reported. It appears to have had the sanction of KENT, C., in the case of *Van Alst v. Hunter* 5 Johns. Ch. 159, already referred to. In the case of *Harwood v. Baker*, 3 Moo. P. C. 282, in which a will had been executed by a testator, on his death-bed, in favor of a second wife, to the exclusion of the other members of his family, he being in a state of weakness and impaired capacity from disease, producing torpor of the brain, and rendering his mind incapable of exertion, unless roused, ERSKINE, J., delivered the judgment of the judicial committee of the privy council in these terms: "Their lordships are of opinion that, in order to constitute a sound disposing mind, a testator must not only be able to understand that he is, by his will, giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his will, he is excluding from all participation in that property, and that the protection of the law is in no cases more needed than it is in those cases where the mind has been too much enfeebled to comprehend more objects than one, and more especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration. And, therefore, the question which their lordships propose to decide in this case is not whether Mr. Baker knew, when he executed his will, that he was giving all his property to his wife and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share in his property. If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though

the justice or injustice of the disposition might cast down some light upon the question as to his capacity."

From this language, it is to be inferred that the standard of capacity, in cases of impaired mental power is, to use the words of the judgment: "The capacity, on the part of the testator to comprehend the extent of the property to be disposed of, and the nature of the claims of those he is excluding. Why should not this standard also be applicable to mental unsoundness produced by mental disease? It may be said that the analogy between the two cases is imperfect; that there is an essential difference between unsoundness of mind arising from congenital defect or supervening infirmity, and the perversion of thought and feeling produced by mental disease, the latter being far more likely to give rise to an *inofficious* will than the mere deficiency of mental power. This is no doubt true; but it becomes immaterial on the hypothesis that the disorder of the mind has left the faculties on which the proper exercise of testamentary power depends unaffected, and that a rational will, uninfluenced by the mental disorder, has been the result. It is said, indeed, by those who insist that any degree of unsoundness should suffice to take away testamentary capacity, that where insane delusion has shown itself, it is always possible and indeed may be assumed to be probable that a greater degree of mental unsoundness exists than has actually become manifest. But this view, which is by no means universally admitted, is unsupported by proof, and must be looked upon as matter of speculative opinion. It seems unreasonable to deny testamentary capacity on the speculative possibility of unsoundness which has failed to display itself, and which, if existing in a latent and undiscovered form, would be little likely to have any influence over the disposition of the will. No doubt when the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should, in the first instance, be made against it.

When insane delusion has once been shown to have existed, it is difficult to say how much further the mental disorder extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will, made under such circumstances, becomes additionally strong where the will is, to use the term of the civilians, an *inofficious* one, that is to say, one in which natural affection, and the ties of near relationship have been disregarded. But where a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect on the testator's will, we can see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld. Such an inquiry may involve, it is true, considerable difficulty, and require much nicety of discrimination, but we see no reason to think that such a question is beyond the power of judicial inquiry and determination, or may not be disposed of by a jury, directed and guided by a judge.

In the case before us, two delusions disturbed the mind of the testator—the one that he was pursued by spirits, the other that a man, long since dead, came personally to molest him. Neither of these delusions, the dead man not having been in any way connected with him, had, or could have, any influence upon him in disposing of his property. The will, though in one sense an idle one, inasmuch as the object of his bounty was his heir at law, and therefore would have taken the property without its being devised to her, was yet rational in this, that it was made in favor of his niece, who lived with him, and who was the object of his affection and regard. We must take it, on the finding of the jury, that, irrespectively of the question of these dormant delusions, the testator was in possession of his faculties when the will was executed. Under these circumstances, we see no reason for holding the will to be invalid. If, indeed, it had been possible in this case to connect the dispositions of the will with the delusions of the testator, the form in which the case was left to the jury might have been open to exception. It may be, as was contended on the part of the plaintiff, that in a case of unsoundness, founded on delusion, but which delusion was not manifested at the time of making the will, it is a question for the jury whether the delusion was not latent in the mind of the testator. But, then, for the reasons we

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have given in the course of this judgment, we are of opinion that a jury should be told in such a case, that the existence of a delusion, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it. This effectually disposes of the question of misdirection. As, for the reasons we have given, we are of opinion that if the testator was, at the time of making the will, of capacity to make a will, as defined by the learned judge, the existence of such a disease, if latent, so as to leave him free from the consciousness and influence of delusion, would not overthrow the will, it follows that, there having been here a total absence of all connection between the delusion and the will, there can have been, practically speaking, no misdirection. If the delusion had been of such a nature as was calculated to influence the testator in making the particular disposition, as was the case in *Waring v. Waring*, and in *Smith v. Tebbit*, a jury would not, in general, be justified in coming to the conclusion that the delusion, still existing, was latent at the time, so as to leave the testator free from any influence arising from it; but, in the case at bar, the disposition was quite unconnected with the delusions, and consequently there is no reason to suppose that the omission to call the attention of the jury to this specifically, at all affected the verdict. Looking to the evidence given on the trial, and to the verdict of the jury, it appears to us that if this case were submitted to another jury, whatever they might find on the first point, their decision must be in favor of the will on the second. It would, consequently, be worse than useless to put the parties to the expense of a new trial, when, in our judgment, the only proper or possible result must be a second verdict establishing the will.—*REP.*

AUDENRIED V. PHILADELPHIA & READING RAILROAD COMPANY,
appellants.

(68 Penn. St. 370.)

Mandatory injunction. Common carrier. Wharfage.

Plaintiff was accustomed to ship coal by defendants' railroad for transportation beyond their line upon the Delaware river. Defendants had also allowed plaintiff, for a certain consideration, to use their wharf at the river terminus of the railroad; but, subsequently, there not being room for all the shippers, they denied plaintiff the wharf facilities, while they allowed others to use the wharf. *Held*, that although transportation by defendants, common carriers, was necessarily open to the public without discrimination, yet wharfage was within the discretion of defendants, and a mandatory injunction would not lie compelling them to allow wharfage facilities to plaintiff as well as others.

BILL for an injunction, filed by Lewis Audenried *et al.*, against the Philadelphia & Reading Railroad Company. It appeared that plaintiff had been accustomed to ship coal by defendants' railroad, destined to points beyond their line, and to be transported from the

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terminus of their road at Port Richmond, upon the Delaware river. Defendants were the owners of a wharf at Port Richmond, which they had allowed plaintiff to use for a certain consideration; but, there not being room for all, they subsequently denied plaintiff the use of wharf, while others were allowed the wharf facilities. This bill prays that defendants may be restrained from discriminating between plaintiff and other persons in the use of the wharf, and that a mandatory injunction issue, compelling defendants to allow wharf facilities to plaintiff. It appeared that defendants had already allotted the whole wharf to other persons. A temporary injunction was granted. Defendants appealed.

J. E. Gowen and Meredith, for appellants.

R. C. McMurtie and G. W. Biddle, for appellees.

SHARSWOOD, J. There are two kinds of injunctions in courts of equity. The one is preliminary, or interlocutory; the other final, or perpetual. The object of the first in general is simply preventive — to maintain things in the condition in which they are at the time, until the rights and equities of the parties can be considered and determined, after a full examination and hearing. A preliminary injunction is never awarded, except when the rights or equity of the plaintiff are clear, at least, supposing the facts of which he gives *prima facie* evidence to be ultimately established.

All injunctions are generally processes of mere restraint; yet final injunctions may certainly go beyond this, and command acts to be done or undone. They are then termed "mandatory." They are often necessary to do complete justice. But the authorities, both in England and this country, are very clear that an interlocutory or preliminary injunction cannot be mandatory. In *Gale v. Abbott*, 8 Jurist, N. S., 987, Vice-Chancellor KINDERSLEY said: "It was useless to come for what was called a mandatory injunction on an interlocutory application. Such an application was one of the rarest cases that occurred, for the court would not compel a man to do so serious a thing as to undo what he had done, except at the hearing." So, in *Child v. Douglas*, Kay, 578, Vice-Chancellor Sir W. PAGE WOOD, now Lord Chancellor HATHERLEY, noticed the same distinction: "The plaintiff has a right to an injunction to restrain the building of the wall until further order; but I can make no order

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on an interlocutory application as to that part of the motion which relates to pulling down what has already been built."

It was said, by Chancellor BLAND, in *Murdock's Case*, 2 Bland, 469 : "To restrain a defendant from making any abusive use of the property in question, or from disposing of it past recall, amounts to no more than the imposition of a temporary limitation upon the free exercise of his right, even if it should eventually appear to be entirely and rightfully his;" which is quite as far as any court can go in the first instance, and as preparatory to a fair, beneficial hearing and final adjudication.

It was held accordingly, in *The Washington University v. Green*, 1 Md. Ch. 97, that an injunction, unless issued after the final decree, when it becomes a judicial process, can only be used for the purpose of prevention and protection, and not for the purpose of commanding the defendant to undo any thing which he had previously done. To the same effect are *The New York Printing and Dyeing Establishment v. Fitch*, 1 Paige, 97; *Bosley v. The Susquehanna Canal*, 3 Bland, 65; *Attorney-General v. New Jersey Railroad Company*, 2 H. W. Green's Ch. 136; *Attorney-General v. City of Patterson*, 1 Stock. 624. This distinction, between a preliminary and final injunction, is fully recognized in our own decisions.

Mr. Justice STRONG states, in his opinion at *nisi prius*, in *The Lehigh Coal and Navigation Co. v. The Lehigh Valley Railroad Co.*, January, 1855, No. 59, April 5, 1855, in which he says : "A preliminary injunction ought never to be granted, except in a clear case, and then only to prevent a substantial injury. Its purpose is to keep things in their existing condition until the case can be finally heard. As it is the strong arm of the law, it must be used only when necessity requires it. And a preliminary injunction can never be necessary when the thing sought to be restrained has been already done; for its province is not to undo, but to prevent and preserve."

The same learned judge, delivering the opinion of the whole court, in *Farmers' Railroad Co. v. Reno, etc., Co.*, 53 Penn. St. 224, said : "The sole object of such an order is to preserve the subject of the controversy in the condition in which it is when the order is made. It cannot be used to take property out of the possession of one party and put it into the possession of the other; that can be accomplished only by a final decree."

To the same point is *Mammoth Vein Coal Company's Appeal*, 54 Penn. St. 183, in which the present chief justice said : "It ought not

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to be forgotten that a preliminary injunction is a restrictive or prohibitory process, designed to compel the party against whom it is granted to maintain his status merely until the matters in dispute shall, by due process of the courts, be determined." It is true that a mandatory order appears to have been made by Mr. Justice LOWRIE, on a motion for a preliminary injunction before him in Allegheny county, in *The Baptist Congregation v. Scannel*, 3 Grant, 48. It is enough to say of that case now, that the question does not appear to have been mooted or argued; at all events, it is not adverted to in the opinion.

There are some few instances in England in which a mandatory order has been made on an interlocutory application; but they have been very extreme cases, and ought not to be followed as precedents.

Thus, in *The Attorney-General v. The Metropolitan Board*, 1 Hem. & Mil. 321, where the flue of a chimney had been stopped up by a plate put over it, so as to fill the house with smoke, the order was made so as to compel the defendant to remove it. In *Hepburn v. Lordon*, 2 Hem. & Mil. 345, damp jute was stored and dried on premises adjoining the plaintiff's premises, at the imminent risk of combustion.

These, and perhaps a few other cases of similar character, rest on the authority of *Lane v. Newdigate*, 10 Ves. 193, in which Lord ELDON, in what he considered a clear and hard case, evidently felt that he was treading on dangerous ground, and therefore resorted to indirection to accomplish his purpose. The plaintiff was the assignee of a lease of mill property granted by the defendant, with covenants for the supply of water from canals and reservoirs on defendant's premises.

The allegation was that he had suffered the canal and reservoir to be out of repair, and especially had removed a certain stop-gate. Lord ELDON expressed a difficulty whether it was according to the practice of the court to decree or order repairs to be done, but afterward said: "So as to restoring the stop-gate the same difficulty occurs. The question is, whether the court can specifically order that to be restored. I think I can direct it in terms which will have that effect. The injunction I shall order will create the necessity of restoring the stop-gate, and attention will be had to the manner in which he is to use these locks; and he will find it difficult, I apprehend, to avoid completely repairing these works."

That is acknowledging that he could not, according to the prin-

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ciples and practice of the court, order the defendant in direct terms to restore the stop-gate and repair the works; the injunction should be so drawn that, although on its face restrictive only, it will, in order to comply with it, compel him to do these very things. This is not a precedent which ought to be followed in this or any other court. A tribunal that finds itself unable directly to decree a thing ought never to attempt to accomplish it by indirection. Injunction, as a measure of mere temporary restraint, is a mighty power to be wielded by one man. It would extend far beyond all safe and reasonable bounds to permit it to go farther.

The reason of the distinction in this respect between an interlocutory and final injunction is very obvious. The former may be granted on an *ex parte* application; even when it is upon notice it is upon *ex parte* affidavits. The mode in which the testimony was taken in this case by an examiner was very unusual; but it cannot change the character of the application. The proceedings, in the nature of things, must be summary. Besides, the effects of an interlocutory injunction may often be the same as a final decree, as, indeed, in this very instance.

The decree appealed from in this case was clearly mandatory. It followed closely *Lane v. Newdigate*, if it did not go beyond it. It commanded the defendants to allot, allow or continue to the plaintiffs such use of a wharf or wharves as are required by them, which shall be equal in quantity and convenience to the wharf accommodations furnished to any other person; and that defendants refrain from allowing any other person to use any part of the wharves while they omit to furnish the plaintiffs with similar wharf facilities in a due proportion. We must take this decree, in connection with the undisputed fact that before the bill was filed the defendants had allotted all their wharves to others; and it is very plain that they could not obey this decree without revoking this allotment and making a new one.

It is very true that it did not appear that any possession had been taken under the allotment at the time the bill was filed. It was upon paper merely. But that ought not to weigh in this case, because the several allottees, under the allotment thus made, were not made parties to the suit and have not been heard. Had they taken possession under their allotments, it is not very easy to see how they could have been proceeded against for a contempt. Their equities may be as strong as the plaintiffs'. Beginners and small dealers

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have their rights as well as old and large ones. What contracts or arrangements for their business upon the faith of the allotment to them they had made we do not know. They were at least entitled to be heard.

Apart, however, from these considerations, we do not think that the facts disclosed by the depositions show so clear an equity in the plaintiffs as would have entitled them to restrictive injunction had they filed their bill before the allotment was made. It is not necessary to go further than this to prove that the preliminary injunction ought not to have been awarded. It is very doubtful whether the defendants, under their charter, are bound to provide any wharf accommodations for the coal dealers at Port Richmond, and equally doubtful whether, having done so to a limited extent, not sufficient to supply the entire business, they are subject to any trust to use or dispose of that property in any particular way.

But to concede both these points, what then? As trustees there is a discretion reposed in them in the use of the property with which a chancellor cannot interfere. It is agreed that they have not room enough for all. They must select some and reject others. Can a chancellor inquire into their motives, and not approving of them, assume the selection himself? The case of *Dummer v. The Corporation of Chippenham*, 14 Ves. 245, upon which the plaintiffs principally rely, does not support their assertion.

There the trustees of a charity school threatened to remove the master because he had voted contrary to their wishes in the election of a member of parliament. The question was: Had the chancellor jurisdiction to inquire into the matter and enjoin against such removal? It was upon demurrer to the bill. Had the master held his appointment for a term certain, which had expired or was about to expire, and the prayer had been to enjoin his re-appointment, it would have had some analogy to this case.

Can any one suppose that such a jurisdiction would have been assumed? It is not a matter which is open to dispute upon the depositions that the allotment of wharves by the defendants was annual—that the allotment made to the plaintiffs in 1869 had expired, and that there was no agreement to renew it. Changes appear to have been frequently made, although, as was natural, the allotments were generally renewed. It is agreed that the company might have put up these privileges every year and sold them to the highest bidder, as is somewhere done with the pews or

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seats in churches. They preferred to distribute them without premium or rent, in order that they might retain a more absolute control over the property.

It may well be, however, notwithstanding this, that an allottee turned out by the defendants, capriciously or from improper motives, during the year for which the allotment was made, might, on equitable grounds, be restored to the privilege for the rest of the year, or by an interlocutory injunction his removal, if threatened, prevented. But what right or equity has such an occupier superior to others, to hold over for another year? That would be to assure him a perpetual lease. If such a perpetual lease had been granted to one coal dealer exclusively in all the wharves, it might well be argued that *Sandford v. Railroad Company*, 12 Harr. 378, would go far to sustain the position that such a grant was *extra vires*.

That case has no bearing upon this. Transportation by a common carrier is necessarily open to the public upon equal and reasonable terms. An exclusive right granted to one is inconsistent with the rights of all others. This was not transportation, but wharfage, the nature of which requires exclusive possession temporarily. The railroad company, as trustees for the public, have a necessary discretion in the management of such interests, and the motives of their proceedings cannot be reviewed by the courts.

It would be a dangerous and alarming power, to be exercised by a chancellor over corporations or other trustees, to direct the appointment to offices, or awarding of contracts, whenever it appeared that it was about to be used from political or other improper motives. This would be in effect to deprive the directors of corporations of their management, and to substitute the chancellor as supreme director or manager. For this reason, we think the decree in this case ought not to stand.

Decree reversed and record remitted.

Rapho and West Hempfield Townships v. Moore.

RAPHO AND WEST HEMPFIELD TOWNSHIPS, plaintiffs in error, v.
MOORE.

(68 Penn. St. 404.)

Highway — latent defects.

In an action against a municipal corporation for damages, resulting from the giving away of a bridge in consequence of latent defects, it appeared that the duty to repair was imposed upon the corporation by statute. *Held*, that as the latent defect causing the injury could have been detected by proper and careful examination, by skilled persons employed by the authorities, the corporation was liable. (*See note, p. 205.*)

ACTION on the case brought by Michael H. Moore against the township of Rapho and the township of West Hempfield. It appeared that plaintiff's teamster was driving on a bridge in a highway connecting the two townships, and the bridge gave away in consequence of a latent defect, precipitating the teamster, wagon and horses into the creek, whereby one horse was killed, and other damage done to plaintiff. There was evidence that the supervisors had examined the bridge a short time previous to the accident, and had discovered nothing indicating unsoundness. At the trial the judge charged, among other things, that "it was the duty of the supervisors of the defendants to keep the bridge in good order and repair, and, therefore, if the facts set forth in these points be true, still, if the injury complained of resulted in consequence of the bridge being out of repair or not in good order, the omission or neglect of the supervisors to keep the bridge in good order, whether willful or otherwise, will render the defendants liable for any damages which have accrued in consequence of such omission to repair, although they may not have had notice of the bridge being defective, or that it was of a latent defect. But the claim against them would be rendered stronger if they did not use all the proper means to ascertain whether there was any defect, and immediately repair it." The verdict was for the plaintiff for \$378.03. The defendants took out a writ of error.

N. Ellmaker, for plaintiff in error, cited *Reeves v. Delaware, Lackawanna & Wilmington Railroad Co.*, 30 Penn. St. 465; *Pittsburgh v. Grier*, 22 id. 54.

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A. H. Smith, for defendant in error, cited *Erie v. Schwingle*, 22 Penn. St. 388; *Humphreys v. Armstrong*, 56 id. 204.

AGNEW, J. But two questions need to be noticed in this case. the duty of repair and the liability of the townships for latent defects. Without a duty of repair no liability rests on the municipality. As a general proposition, but by no means universal, bridges are treated as portions of the highways which cross them, and are to be maintained by the same persons to whom the duty of repairing the highways is committed. Shear. & Redf. on Negligence, § 248. In this State the duty is statutory, and, therefore, we must look to the statute for its nature and extent. The sixth section of the act of 13th June, 1836, requires public roads or highways to be effectually opened and constantly kept in repair, and at all seasons to be kept clear of all impediments to easy and convenient passing and traveling, at the expense of the respective townships, as the law shall direct. By the tenth section, those laid out on a line which divides two townships shall be opened and kept clear and in repair at the joint and equal charge of such townships. The twenty-seventh and following sections require these duties to be performed through supervisors, to whom large powers are given for the purpose. Brightly, 875, pl. 41, 42, 43, etc. Coming to the thirty-fourth section, it is provided that where a small creek, over which a bridge may be necessary, shall be the boundary, or on the division line of townships, the bridge shall be built and maintained at the joint and equal expense of said townships, by their respective supervisors, in the manner directed by law in the case of public roads, which may be the division line of the townships. Brightly, 822, pl. 56. Thus it is clear that by law the primary duty of maintaining and repairing the bridge in question lay on the townships, defendants jointly; the stream over which it was built being on the division line between them. For this purpose, the supervisors of roads of the respective townships were the agents constituted by law; and it is equally clear that the personal liability of the supervisors, for their neglect to perform this duty, does not lessen the primary liability of the townships to those who suffer injury from their neglect. These principles will be found to be fully supported by the following cases: *Dean v. New Milford Township*, 5 W. & S. 545; *Erie City v. Schwingle*, 22 Penn. St. 385; *Pittsburg v. Grier*, id. 54; *Humphreys v. County of Armstrong*, 56 id. 204; *Penn. & Ohio Canal Co. v. Graham*, 63 id. 290; *Meadville*

v. *Erie Canal Co.*, 18 id. 66. That an action on the case will lie at the suit of a party who has suffered a special injury, as in this case, is also shown by the same authorities.

But it is contended that the defect in this bridge being latent no liability can be imputed to the townships, until it is shown that notice of the defect was given to the supervisors in whose charge the bridge lay. This is the chief question, and is not without difficulty. The defect here was the inward rottenness of the timbers which constitute the main strength and chief support of the bridge. It was not outwardly visible, one of the supervisors having inspected the timbers outwardly a short time before it fell. But the evidence shows that the bridge had been erected and stood the time it is usual that such timber will last, that it was uncovered and open to the weather, and that the actual state of the timbers can be ascertained by persons having ordinary skill upon such a subject. It was testified that the internal condition of the timbers can be readily determined by boring into them at proper points. The question of liability for this latent defect was determined by the jury on these facts; the court having instructed them that constant watchfulness, on part of the supervisors, was a duty to the public, and having left it to them to determine whether the supervisors had used ordinary care in performing this duty, and in applying the proper tests to ascertain the soundness of the timbers of the bridge. That a municipal corporation, though bound to the duty of maintenance and repair, is not absolutely bound for the soundness of the structures it erects as parts of a public highway, must be admitted to be the general doctrine of the authorities on this question. It is not an insurer against all defects, latent as well as patent, but is liable only for *negligence* in the performance of its duties. Hence it is said in *Shear. & Redf. on Negligence*, § 148, as the result of the authorities, that when the defect in a lawful structure is *latent*, or is the work of a *wrong-doer*, either express notice of it must be brought home to the corporation, or the defect must be so notorious as to be evident to all who have occasion to pass the place, or to observe the premises, in which case the corporation is charged without constructive notice, being in fault for not knowing the fact. *Id.*, § 407. But what is negligence is itself a question in each case, and must always depend on its peculiar circumstances. "Great danger demands higher vigilance and more efficient means to secure safety; where the peril is small less will suffice." *F. & B. Turnpike Co. v. Phila. & Trent.*

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Railroad Co., 54 Penn. St. 350. "The degree of care having no legal standard, but being measured by the facts that arise, it is reasonable such care must be required as, it is shown, is ordinarily sufficient, under similar circumstances, to avoid the danger and secure the safety needed." *Id.* Applying these principles here, it may be asked what structure more important in view of the safety of life and property can be well imagined than such a bridge as this, having a span of fifty-two feet, crossing from ten to twelve feet above the stream, whose water is middle deep. The accident itself is evidence of its important character. The plaintiff's wagon was overturned in the fall, the body crushed, the load of wheat fell underneath it into the stream, and one of the horses was killed. As remarked by our brother READ, "a bridge looks fair till it breaks down; it is not like a pit, which you can see and avoid." "In practice, it is used up to the last moment." *Humphreys v. Armstrong Co.*, 56 Penn. St. 204. Hence, such a structure demands constant vigilance to guard and preserve it. Therefore, when a bridge is old, having stood for the length of time the timbers composing it are accustomed to last, and when it may be reasonably expected that decay has set in, it is negligence to omit all proper precautions to ascertain its true condition. Nor will mere appearance in such a case excuse the neglect. It is a matter of common knowledge that invisible defects may, and under such circumstances probably do, exist; that either wet or dry rot may have set in, and not be visible, and therefore should be sought for. But no one of ordinary intelligence would think of seeking for an inward and invisible defect by merely inspecting the surface of the wood. This being the case, it is clearly the duty of the supervisors, having thus reason to believe that defects may exist, to call to their assistance those whose skill will enable them to ascertain the true state of the structure, and determine the question of its safety. Without doing this much at least, their duty to the public is not performed. Not to do it is therefore negligence, and this is the point on which the case went to the jury. There is, therefore, no error in the submission. The exceptions to the evidence have but little merit, and are not properly assigned. They are, therefore, not noticed.

Judgment affirmed.

NOTE. — See *Weisenberg v. City of Appleton*, 7 Am. R. 39 and the note thereto, wherein the authorities on the subject of notice are collected. — REP.

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MARSH'S APPEAL.

(60 Penn. St. 30.)

Partnership — services of partner.

A partner who neglects and refuses, without reasonable cause, to perform personal services which he has stipulated to render the partnership, is liable to account to the firm for the value of the services in the settlement of the partnership accounts.

Where several persons entered into articles of agreement, forming a partnership, and one of the partners, by *verbal* agreement, assumed to render certain services which he neglected to perform; *held*, that he was chargeable with the value of his services on the settlement of the firm accounts. (*Ses note*, p. 212.)

BILL in the court of common pleas of Union county by James S. Marsh, Joseph W. Shriner and Charles C. Sharkley, administrators, etc., of Frederick Marsh, against Samuel Geddes, filed July 16, 1867, for the settlement of the partnership accounts of the late firm of Geddes, Marsh & Co. The case was referred, and the master reported the following article of agreement :

"This article, made and concluded this 23d day of April, A. D. 1852, witnesseth : That Samuel Geddes, James S. Marsh, Joseph W. Shriner, Elisha C. Marsh and Frederick Marsh, hereby enter into partnership upon an equal footing, to carry on the foundry, and grain-drill and stove business, on the premises hitherto occupied by Geddes & Marsh. The style of the firm to be Geddes, Marsh & Co. The real estate and stock in trade of the firm of Geddes, Marsh & Co. to be acquired and paid for as specified in the following article of agreement (hereto annexed) between Geddes & Marsh and Geddes, Marsh & Co. The said Samuel Geddes and James S. Marsh to furnish Geddes, Marsh & Co. all the capital said firm may think necessary to carry on the business of said firm, and to be allowed interest on all such advancements, at the rate of six per cent per annum. This partnership to last for the period of ten years, unless sooner dissolved by mutual consent.

"Some time afterward, E. C. Marsh withdrew from the firm, and about June, 1853, Geddes ceased to participate actively in the management of the business, and took no part in it till January, 1858.

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when Frederick Marsh died, after which he was occasionally present, up to September, 1858, when the firm was formally dissolved."

He further reported :

* * * "The facts developed by the testimony are as follows: That Samuel Geddes voluntarily withdrew from the partnership at the time stated in the testimony, some four or five years, and refused to render any service as a partner for the period mentioned; that his services would be worth \$1,000 a year at the least; that there was a verbal understanding among the partners, at the time of the formation of the partnership, that each should take a particular department of the business; that Mr. Geddes was to manage the finances; that he was well qualified for this position, and was a careful and correct business man, and was given that place on account of his fitness for it, and that he performed this duty until he withdrew; that a loss was suffered by the firm during the absence of Mr. Geddes, in the stove account of the firm against agents, for their sale, amounting to some \$5,000, by reason of the inattention of one of the partners who took Mr. Geddes' place; that to have dissolved the firm, at the time of the withdrawal of Mr. Geddes, would have been at the risk of great loss in the then condition of the business; that the proof is sufficient to sustain the amount charged by complainants for loss of service, if under the law they are competent to make the charge. It is not alleged in the bill, nor do any of the witnesses prove, that the withdrawal of Geddes was done for the purpose of producing loss and damage, or for the purpose of unfairly appropriating the profits of the business to himself, nor does the evidence sustain the charge that it was done for the purpose of engaging in antagonistic business. It is clear that Mr. Geddes withdrew because of apprehension of loss in the completion of the furnace, and subsequent irreconcilable personal differences between the members of the firm. Under the pleadings and the evidence, then, the question is, can a partner, under articles of association for a limited term of years, withdraw his services from the business of the firm, by reason of apprehension of loss and personal differences, rendering intercourse unpleasant, and, at the expiration of the time limited, on a settlement of partnership accounts, claim a share of the funds without accounting to his copartners for the value of his services during his absence. This is the only allegation in the bill; there is no allegation that the withdrawal was a loss or damage other than the loss of personal service. * * *

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"As to the question of compensation, I understand the law to be, and so rule, that, in the absence of express stipulation, no such charge can be sustained. That if a partner fraudulently withdraws from a firm, occasioning loss of profits and damage, it may be possible he may be made responsible in equity in a proper case, and with sufficient allegations. * * * The bill, in effect, seeks to measure the value of the services rendered by the members to the firm, and to give some of them compensation for such service without any stipulation to that effect in the written agreement. The withdrawal of Geddes might have been sufficient cause for the dissolution of the partnership, and he might have been made responsible at law if the withdrawal had not been justifiable; but the other partners, in not adopting this course, cannot receive compensation for services rendered to the firm after the withdrawal, for what they did afterward was no more than they agreed to do when the partnership was formed. * * * I refuse to allow the charge made for loss of services as partner."

Exceptions were filed to the report by the complainants. They were overruled by the court, and a decree entered in accordance with the finding of the report. The plaintiffs appealed to the supreme court.

G. F. Miller, for appellants. A partnership is to be regulated by the written articles so far as they go, but the partners will be bound by a verbal agreement. *Casey* on Part., 5 Law Lib. 3. Each partner must devote his attention and skill to the business of the firm. *Pars.* on Part. 6; 3 *Kent's Com.* 20. If losses occur by breach of duty by one partner, he must individually bear the loss. *Id.* 224; *Caldwell v. Seiber*, 7 Paige, 494; *Crawshay v. Collins*, 15 Ves. 226. If a partner quits the business for an unreasonable cause he should make good the loss. *Howell v. Harvey*, 5 Ark. 270. Bill in equity is the proper mode for settling partnership transactions. *McFadden v. Hunt*, 5 Watts & Serg. 468; *McFadden v. Sallada*, 6 Penn. St. 283.

J. C. Bucher, for appellee. An extra allowance cannot be made to a partner for services unless by special agreement. *Collyer* on Part., § 183; *Story* on Part., §§ 192, 198; *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 68; *Franklin v. Robinson*, 1 Johns. Ch. 157; *Burden v. Burden*, 1 Ves. & Bea. 170; *Bradford v. Kimberly*, 3 Johns. Ch. 431; *Lee v. Lashbrooke*, 8 Dana, 219; *Paine v. Thacher*, 25 Wend. 450;

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Newland v. Tate, 3 Ired. Eq. 232; *Caldwell v. Lieber*, 7 Paige, 483; *Phillips v. Turner*, 2 Dev. & Bat. Eq. 123; *Beatty v. Wray*, 19 Penn. St. 516; *Brown v. McFarland*, 41 id. 129; *Gyger's Appeal*, 62 id. 73.

WILLIAMS, J. The only question in this case is, whether a partner who neglects and refuses, without reasonable cause, to perform the personal services which he has stipulated to render the partnership, is liable to account to the firm for the value of the services in the settlement of the partnership accounts. The master and the court below refused to charge the defendant with what would have been the value of his services to the firm if they had been rendered as agreed; because, in the absence of an express stipulation, partners are not entitled to compensation for their services, however unequal in value or amount; and to require the defendant to account for the value of his services would be, in effect, allowing compensation to the other members of the firm for the services they rendered. It is undoubtedly true, as a general rule, that partners are not entitled to charge each other, or the firm of which they are members, for their services in the copartnership business, unless there is a special agreement to that effect, or such agreement can be implied from the course of dealing between them. By the well-settled law of partnership, every partner is bound to work to the extent of his ability for the benefit of the whole, without regard to the services of his copartners, and without comparison of value; for services to the firm cannot, from their very nature, be estimated and equalized by compensation of differences. *Beatty v. Wray*, 19 Penn. St. 519.

In the absence, therefore, of any special provision allowing compensation for services, the law will not make any, nor infer one from the greater industry or greater ability of any one partner. The doctrine seems to be that partners are considered as meeting on common ground, each engaged to do all he can for the common good; and whatever any one does, he has no claim for any thing beyond his equal share of the common benefit without the consent of his copartners. *Parsons on Partnership*, 229, 230. The principle on which the master and the court below refused to charge the defendant is too firmly imbedded in the law of partnership to admit of question; but the doubt is as to its applicability to the facts of this case. The plaintiffs are not seeking compensation for the services they rendered the partnership. They are simply seeking to charge the defendant with the loss occasioned the partnership by his refusal to render the

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services which he agreed to perform. If the partnership has suffered loss by his breach of the agreement, why should he not make good the loss, and put the firm in the same condition it would have been if he had not broken the agreement? If the defendant is compelled to make good the loss, each member of the firm, including himself, will receive his proportion of the amount in the distribution of the partnership assets, and in no just sense can this be regarded as compensation for the services individually rendered.

If, then, the value of the services is the measure of the loss, why should not the defendant be charged with their value? It may be that in the absence of any agreement to render the special services, he would not be chargeable for his neglect to perform them. The question is not whether one partner, in the absence of an express agreement, is entitled to compensation for the services he may render, or whether, if he fails to render any, he is liable to the partnership for the breach of the implied obligation to exercise diligence and skill, and to devote his services and labors for the promotion of the common benefit of the firm. But the question with which we have to deal is, whether a partner who agrees to render special service to the firm, for the performance of which he is well qualified, and which was one of the inducements for the other members to enter the partnership, is liable to account for the value of such service, if he wrongfully refuses to perform it? If, says Mr. Justice STORY, the partnership suffers any loss from the gross negligence, unskillfulness, fraud or wanton misconduct of any partner in the course of partnership business, he will ordinarily be responsible over to the other partners for all the losses and injuries, and damages sustained thereby, whether directly or through their own liability to third persons. Of course all losses, injuries and damages sustained by the partnership from the positive breach of the stipulations contained in the articles of partnership on the part of any partner, are to be borne exclusively by that partner, and he must respond over to the other therefor. STORY'S *Partnership*, § 169. If this be the law why should not the defendant be answerable to the partnership for his breach of the agreement to perform the services stipulated?

The master has found, upon competent and sufficient evidence, that there was a verbal understanding among the partners, at the time of the formation of the partnership, that each should take a particular part of the business; that the defendant, Geddes, was to manage the finances; that he was a careful and correct

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business man, well qualified for the position, and was given that place on account of his fitness for it; and that he performed this duty until he withdrew his services; that to have dissolved the firm at that time would have been at the risk of great loss in the then condition of the business; and that the proof is sufficient to sustain the amount charged by complainants for loss of service, if, under the law, they are competent to make the charge. But why should there be a doubt in regard to their right to charge the defendant with the amount of the loss? Why should not a partner be just as responsible for the breach of his agreement to render personal services to the partnership as for the breach of any other stipulation in the partnership contract? No good reason can be suggested why there should not be the same rule of accountability in the one case as in the other. It has been held that where, by the articles of copartnership, one partner is exempted from the duty of rendering his personal service to the joint business, if he afterward does render such services, at the instance and request of his copartners, he will be entitled to a reasonable compensation therefor. The general rule that one partner cannot charge the firm for his services is founded on the principle that each partner is bound to devote his skill and labor to the promotion of the common benefit of the concern, and is inapplicable where the reason of it fails. *Lewis v. Moffet*, 11 Ill. 392. And so it has been held that where partners agree to invest equal amounts of money in their common business, and one advances a larger sum than the other, he is entitled, upon settlement, to an allowance of interest on one-half of the excess so advanced by him from the date of its appropriation to the use of the firm. *Reynolds v. Mardis*, 17 Ala. 32. And why, by parity of principle, should not one partner be entitled, upon settlement of partnership accounts, to charge his copartner with the value of the services which he agreed to give and refused to render? If the defendant had made profit by engaging in other business in violation of his contract, it is settled that the plaintiffs would have their option, either to sue for damages for the breach of the contract, or to bring a bill in equity to compel an account. *Moritz v. Peebles*, 4 E. D. Smith, 135. And it would seem to follow that they have the same option as it respects the remedy for the defendant's refusal, in violation of his contract, to render the services which he agreed to perform. The court below was, therefore, in error in not requiring the defendant to account to the partnership for the loss occasioned by

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his breach of the agreement. The proper measure of the damages, under the circumstances of the case, is the value of the services wrongfully withheld. The decree must, therefore, be set aside, and the record remitted to the common pleas, with instructions to charge the defendant in the settlement of the partnership accounts with the value of the services which he agreed and wrongfully refused to render, and to distribute the partnership funds to the partners entitled thereto, in accordance with the principles laid down in this opinion.

Decree accordingly.

NOTE.—In the absence of any special agreement, partners are not entitled to charge for services. *Franklin v. Robinson*, 1 John. Ch. 164; *Bradford v. Kimberley*, 3 Id. 434; *Hill v. Matta*, 12 La. Ann. 179; *Ountiff v. Duersville Manuf. Co.*, 7 R. I. 325; *Hutchinson v. Smith*, 5 Irish Eq. 128; *Zimmerman v. Huber*, 29 Ala. 380.

Nor without special agreement is a surviving partner entitled to compensation for closing up the business. *Piper v. Smith*, 1 Head. 94; *Patten v. Calhoun*, 4 Grat. 128; *Gyggers' Appeal*, 1 Am. Rep. 383. Nor for carrying on the business. *Stocken v. Dawson*, 6 Beav. 311; *Burden v. Burden*, 1 Vesey & B. 170. But see *Griggs v. Clark*, 23 Cal. 430, where the surviving partner was allowed compensation to be deducted from the profits for services in taking care of the stock, although it was held that he was not entitled to compensation in winding up the affairs of the firm. So, in *Hutchinson v. Onderdonk*, 2 Halst. Ch. 300, the surviving partner was allowed three per cent for services in settling the business of the concern. See, also, *Hitz v. Hitz*, 1 B. Mon. 179. So when one of the partners is an attorney, and accounts are divided between the parties to collect, no allowance can be made to the attorney partner for collections. But, if he had been employed by the firm to bring suits as an attorney, he would have been entitled to compensation, as that is an additional employment outside of the firm business. *Vanduser v. McMillan*, 87 Ga. 311.—REP.

THE NORTH AMERICAN LIFE AND ACCIDENT INSURANCE CO.,
 plaintiffs in error, v. BURROUGHS.

(50 Penn. St. 43.)

Accident insurance—accidental injury.

An accident insurance policy was issued containing a stipulation that the insurance should not embrace any "death caused by natural disease, surgical operation, unreasonable imprudence." While the insured, who used to be a farmer, was pitching hay in the field of a relative whom he was visiting, the handle of the pitchfork slipped through his hands and struck him in the bowels, inflicting an injury which produced peritoneal inflammation, in consequence of which he died. *Held*, that this was a case of death resulting from an injury occasioned by "accident."

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Where a policy does not require that the preliminary proof shall give the mode and manner of death, but merely proof of the injury, and that the death was occasioned by such accidental injury, *held*, that the plaintiff may recover, although the preliminary proofs unwittingly ascribe the injury to a wrong cause. (*See note, p. 218.*)

ACTION on a policy of accident insurance brought by Anna L. Burroughs against The North American Life and Accident Insurance Company. Plaintiff was the wife of the insured. The policy was dated December 13, 1866, and insured Garrett S. Burroughs in the sum of \$5,000, to be paid to Anna L. Burroughs, * * * in case of death resulting within twelve months from the date of this policy in consequence of accident.

"Provided, always, That no payment shall be due, and no claim be made, under this policy by any one on account of such accidental loss of life of the assured, unless notice of such injury and of such death shall be given to the company within thirty days after the happening of either, and sufficient proof furnished said company of such injury, and that such death was caused solely by such accidental injury, and ensued within three months from the happening thereof.

"And provided, further, That this insurance shall not extend to, or cover, or embrace, any death caused by natural disease, surgical operation, unreasonable imprudence."

Among the conditions were these :

2. For the purpose of identification, notice must be given in writing to the company, at its office in Philadelphia, by the party insured, of any change of residence, name, *occupation or business.*

3. In the event of any change of avocation, occupation or business, either the policy shall be canceled and the proportion of the premium for the unexpired term returned, or the difference for the extra hazard repaid by the assured and indorsed on the policy; otherwise this policy shall be null and void.

4. In case of injury producing death of the assured, happening as aforesaid by accident, within the meaning of this policy, the party for whose benefit the insurance is made shall, within thirty days thereafter, give notice of the same in writing, with sufficient proof of such injury and of death.

In his application for insurance, the deceased stated that his "profession or occupation," was "earthenware manufacturer."

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It appeared that deceased used to be a farmer, and the injury causing death, occurred while he was on a visit to his grandfather.

The opinion states the other material facts. The verdict was for plaintiff. Defendants took out a writ of error.

S. Dickson (with whom was *J. C. Bullitt*), for plaintiffs in error.

J. H. Sloan (with whom was *J. Soforth*), for defendant in error.

WILLIAMS, J. In this case, the jury have found on sufficient evidence that, while the insured was pitching hay, the handle of the pitchfork slipped through his hands and struck him on the bowels, inflicting an injury which produced peritoneal inflammation, in consequence of which he died ; that the blow which he received from the fork-handle was an accident and the cause of his death. The case, therefore, comes directly within the terms of the policy declared on. But it is objected that the plaintiff was not entitled to recover, because no sufficient preliminary proof was furnished to the company that the death of the insured was caused solely by an accidental injury ; that the injury, described in the preliminary proofs of loss furnished by the plaintiff, is not an accidental injury within the meaning of the policy, and is not covered by its provisions. The policy provides that no payment shall be due, and no claim be made under it, on account of the accidental loss of life of the assured, unless notice of the injury and of the death shall be given to the company, within thirty days after the happening of either, and sufficient proof furnished said company of such injury, and that such death was caused solely by such accidental injury, and ensued within three months from the happening thereof. Substantially the same provision is also contained in the fourth condition of the policy : " In case of injury producing death of the assured, happening as aforesaid by accident, within the meaning of this policy, the party for whose benefit the insurance is made shall, within thirty days thereafter, give notice of the same in writing, with sufficient proof of such injury and of death."

Notice was given to the company on the 12th of August, 1867, within the time limited by the policy, that the assured came to his death by accident, on the 14th of July, by an injury received in the bowels, while working in a hay-field, producing peritoneal inflammation, which resulted fatally. And, in proof thereof, the affidavits

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of the plaintiff and attending physician were subsequently furnished to the company. No objection was made to the affidavits, on the ground that they were not furnished in time, and, under the evidence, no such objection could have been properly made. The only objection then and now made to the affidavits is, that they do not show that the assured "died as the result of any injury received by accident." But, if the facts stated in the affidavits are true, why do they not make out a *prima facie* case of death resulting from an injury occasioned by accident?" The plaintiff's affidavit expressly avers "that her late husband died in consequence of an accident which happened on the 9th of July, 1867, on this wise: Said deceased, on the day aforesaid, was assisting in unloading hay in Hopewell township, New Jersey, at his grandfather's, where he had gone on a visit, when he accidentally strained himself. He immediately complained of severe pain, and a physician was summoned. All was done for his relief and recovery that could be, without success. He lingered till the fourteenth of said month, when he died, and the said accident was the direct cause of his death." And the attending physician, after stating in his affidavit that he personally knew the assured, says that he "knows that he was killed by accident on the 14th day of July last; and, further, that the accident was occasioned by exertions made in assisting in hauling in hay, which injured the abdominal muscles, and produced peritoneal inflammation and all its concomitant symptoms, which resulted in his death on the 14th of July last." If the facts set forth in these affidavits be true, and they are perfectly consistent and reconcilable, do they not show with reasonable certainty that the death of the assured was caused by an accident? Taking both affidavits together they substantially allege that the assured, while assisting in hauling in and unloading hay, accidentally strained himself, injuring his abdominal muscles and producing peritoneal inflammation, which resulted in his death; and that the said accident was the direct cause of his death; and, if so, can there be any doubt as to the sufficiency of the preliminary proof? But it is said that, if the assured strained himself while unloading hay, it was not an accident insured against within the meaning of the policy. Why not, if he *accidentally* strained himself, as is averred in the plaintiff's affidavit? Why is not death resulting from an accidental strain as much within the meaning of the policy as death produced by any other accidental cause? If the injury be accidental, and the result of it death, what matters it whether the

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injury is caused by a strain or blow? An accident is "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected; chance, casualty, contingency." And accidental signifies, "happening by chance or unexpectedly; taking place not according to the usual cause of things; casual; fortuitous. We speak of a thing as accidental when it falls to us as by chance, and not in the regular course of things; as an accidental meeting, an accidental advantage, etc." Webster's Dictionary *ad verba*. If then these words, as used in the policy, are to be understood in their plain and ordinary meaning as thus defined, they include death from any unexpected event which happens as by chance, or which does not take place according to the usual course of thing. And there is no more reason for regarding an injury of the abdominal muscles, caused by an unexpected blow, an accident than an injury caused by a casual and unlooked for strain. If the death of the assured resulted from an accidental strain, then it was not "caused by natural disease." And, if it resulted from any accidental strain, it does not follow that it was caused by "unreasonable imprudence," or "the doing of an unlawful act," and there is nothing in the affidavits from which such an inference can be fairly drawn. Taking the facts to be as stated in the affidavits, they undoubtedly make out a *prima facie* case of death resulting from an injury accidentally received; and, if so, the preliminary proof furnished by the plaintiff must be regarded as sufficient and there was no error in refusing the defendant's fourth and fifth points.

Whether the plaintiff was entitled to recover, on showing that the death of the assured resulted from an injury of the abdominal muscles, caused by a blow, and not by an accidental strain, is another question raised by the defendant's third point which we shall now proceed to consider. No objection was made to the admission of the evidence on the ground of variance, and the only question is whether the plaintiff, under the preliminary proof, was entitled to recover for death resulting from an accidental injury, shown to have been caused by a blow instead of a strain. The policy does not expressly require that preliminary proof shall be furnished of the mode and manner in which "the injury producing death" was inflicted; but only that "sufficient proof be furnished of *the injury* and that such death was caused solely by such accidental injury." The affidavit of the attending physician describes *the injury* which

the assured received, and in consequence of which he died, precisely as it was proved by his testimony on the trial. The only difference between them is, that in the former the cause of the injury is not stated otherwise than by terming it "an accident," and, in the latter, it is shown to have been caused by an accidental blow from the handle of a pitchfork. But the injury, as described in both, is in all respects the same and its results are the same. If then "the injury producing death" is correctly described in the preliminary proof, why shall not the plaintiff be allowed to recover though she may have imputed it to a wrong cause—to a strain instead of a blow? It seems to us that, under the terms of the policy, the plaintiff is entitled to recover if she has given sufficient preliminary proof of the injury though she may have unwittingly ascribed it to a wrong cause. It is not such a variance as should be regarded as fatal. Undoubtedly there must be sufficient preliminary proof of the injury, that it was accidental, and the cause of the death of the assured. These requisites are all found in the preliminary proof furnished by the plaintiff in this case, and they are all that the policy requires. If the injury, as described in the affidavit of the attending physician, was the cause of the death of the assured, it is a matter of no consequence, so far as respects the liability of the company, whether it was produced by an accidental strain or by an unexpected blow from the handle of a pitchfork.

But it is further objected to the plaintiff's right of recovery that the assured did not give notice of the change of his occupation, nor pay the difference of premium for the extra hazard, as required by the second and third conditions of the policy, and therefore the contract became null and void. But there was no evidence that the assured had changed his occupation or business, and the learned judge before whom the case was tried rightly refused to submit the question to the jury. The assured, as was shown, while on a visit to his grandfather, had assisted in hauling in and unloading hay. But this was not a change of his occupation or business within the meaning of the policy. To give to the word such a construction would prevent the assured from performing any act or service outside of his usual avocation or business without rendering the policy null and void. Such a construction would be unreasonable and absurd, and the defendant's first and fifth points were properly refused.

The first, second, third, fifth and eighth assignments are not in

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accordance with the rules and must be disregarded; but if properly made there is nothing in them which would avail the plaintiff in error. The sixth and seventh assignments are not sustained, and there is nothing in them that calls for special notice. The questions presented by the remaining assignments, the ninth, tenth, eleventh, twelfth, thirteenth and fourteenth, have been already considered, and as we discover no material error in the record, the judgment is affirmed.

Judgment affirmed.

NOTE. — See note to *Mallory v. The Traveler's Insurance Co.*, 7 Am. R. 414. In *Southard v. Railway Passengers' Assurance Co.*, 84 Conn. 574, a rupture caused by jumping from a car, running, done voluntarily and unattended by any falling or stumbling, was held not to constitute an injury caused by accident. In *Fulton v. Accidental Death Ins. Co.*, 17 C. B. (N. S.) 122, by one of the conditions of the policy against accidental death or injury, it was provided that the policy insured against cuts, stabs, concussions, etc., "when accidentally occurring from material and external causes where such accidental injury is the sole and direct cause of death to the insured, or disability to follow his avocation;" and then followed this exception: "But it does not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or cause arising within the system of the insured before or at the time, or following such accidental injury whether causing death or disability directly or jointly with such accidental injury." It was held, that death from hernia, caused solely and directly by external violence, followed by a surgical operation performed for the purpose of relieving the patient, was not within the above exception.

In *Smith v. Accidental Insurance Co.*, L. R. 5, Ex. 302, the policy was identical with that in the above case of *Fulton v. The Accidental Ins. Co.*, except that in the exception "secondary cause" was inserted after the words "erysipelas or any other disease." The assured, on Saturday, the 24th of April, accidentally cut his foot against the broken side of an earthenware pan. On the Thursday following erysipelas supervened, and of that disease he died on the next Saturday. The erysipelas was caused by the wound, and but for the wound he would not have suffered from it. Held, that the Insurers were protected by the conditions in the policy and were not liable. The case was distinguished from the *Fulton* case on the ground that the condition in the policy in that case did not contain any reference to "secondary" causes, and the hernia was instantaneously caused by the accident.

Where a policy provides that it shall be void if the assured change his occupation without notice, to a more hazardous one, held, that the term "changing his occupation" meant engaging in another employment as a usual business. *Administrators v. The United States Casualty Co.*, 5 Vroom. (34 N. J.) 371. In an action upon a policy which insured against accidents generally, and provided expressly in what particular case the company were not to be liable, but did not provide that they would not be liable for a death occurring from a cause not connected with the occupation of the assured, or that he should not change his occupation, held, that the application of the assured was inadmissible to show his occupation at the time of effecting the insurance, so as to prove that he was otherwise employed when he met his death, such evidence being immaterial. *Provident Life Ins. Co. v. Fennell*, 49 Ill. 180.

The words "totally disabled from the prosecution of his usual employment" means inability to do substantially all kinds of his accustomed labor to some extent. To recover in such case, the assured must be deprived of the power to do to any extent substantially all the kinds of labor which constitute his usual employment. For such time he can recover and for no longer. *Sawyer v. United States Casualty Co.*, 8 Am. Law Reg. N. S. 233. In *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. 545, the policy contained a proviso that, in case the accident "shall cause any bodily injury of so serious a nature as wholly to disable him from following his usual business, occupation or par-

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suits," the company would pay a certain sum during the continuance of the disability. The insured, who was solicitor and registrar of a county court, sprained his ankle severely, and was confined to his bed-room several weeks. *Held*, that inasmuch as the insured was so disabled as to be incapable of following his usual occupation, business or pursuits, he was "wholly disabled" within the meaning of the policy.

For a full discussion of the subject of Accident Insurance, see *Bills on Life Insurance*. — *Rap.*

LINDEMAN, plaintiffs in error, v. LINDSEY.

(60 Penn. St. 93.)

Riparian owners — water privilege.

The owners of land, on opposite sides of a stream, agreed by covenant, running with the land, jointly to erect a dam, each to have the use of half of the water. The title to the land passed by various intermediate conveyances to plaintiff on one side of the stream, and defendant on the other. *Held*, that an action on the case would lie by plaintiff against defendant for using more than half of the water. In such a case, nothing less than an absolute denial of the right to one-half the water, followed by an enjoyment inconsistent with its existence for a period of twenty-one years or more, can amount to an extinguishment of it.

ACTION on the case by plaintiff against defendant, for using more than his half of the water of a stream.

The plaintiff owned a fulling-mill on one side of the Conodoguinet, and Lindeman, the defendant, a grist-mill on the other side.

The fulling property was owned on the 17th of April, 1820, by John Whisler, and the grist-mill, at the same time, by Jonas Rupp. On that day Rupp and Whisler entered into this agreement:

* * * "Whereas the said parties contemplate erecting a dam upon the said creek, for the purpose of using the water of the same creek, for mill-works, to be erected on the lands lying contiguous to said creek, on which they now respectively reside. Now, therefore, etc., the said Jonas Rupp *covenants and engages for himself, his heirs, executors, administrators and assigns, that he, or they, or some of them, shall and will, during the ensuing summer, at his or their proper costs, etc., sufficiently build, etc., a dam upon and over the Conodoguinet creek aforesaid, from shore to shore, at such place, and of such dimensions as may be agreed on between the said par-*

ties, the said dam to be built at right angles with the stream of the creek, and to be so constructed as to raise the water in the dam three feet six inches, etc. * * * And in case that the said dam should be injured or destroyed by high water or otherwise, then the said Jonas Rupp, or his heirs, is to repair or rebuild the same again, at his own or their proper expense or charges, as first aforesaid, and in case the said John Whisler, *his heirs or assigns*, should erect a mill, they shall be at liberty to use one-half of the water in the said dam.

“And the said John Whisler, for himself, his heirs, executors and administrators, covenants and engages, that as soon as he or they shall erect any mill at or near the said dam, and draw any water out of the said dam for said mill, that he or they shall and will forthwith pay to the said Jonas Rupp, his heirs or assigns, one-half of the expense of the millwright costs paid in building and constructing the dam aforesaid by the said Jonas Rupp, his heirs or assigns. And in case the said dam should be injured or carried off or destroyed, it shall again be repaired or rebuilt by and between the said parties, at their joint and equal expense, if such injury happened after the mills shall have been erected on both sides of the dam aforesaid. * * *

“It is further agreed, that the said Jonas Rupp may apply for the view of a road, from the fording, etc. * * * And for the true and faithful performance of the articles and covenants within mentioned, each of the parties bindeth himself, his heirs, executors and administrators, unto the other, his heirs and assigns, in the sum of one thousand dollars.”

This agreement was recorded April 25, 1820.

Through various intermediate conveyances, Whisler's title became vested in the plaintiff and Rupp's in the defendants, and Fishel was his tenant at the mill.

The plaintiff testified that the defendants, in September, 1869, ran their mill day and night, and, when he did so, the water was low; he started on Sabbath evening, and on Monday morning there was no head for the fulling-mill; he remonstrated with both defendants, but it was not stopped; plaintiff told them that he would bring suit if they continued to run their mills so; they continued and he brought this suit; he had complained to former occupants, and they would generally stop the mill.

The plaintiff offered to prove, by Jeremiah Bowers, “that he was a former owner of the property now held by Lindsey, and, while he

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was occupying and carrying on the factory, Wilhelm was the occupier of the Lindeman property; they made the repairs to the dam, share and share alike, and, when the water was too low to enable the witness to do work at his factory, he went over to Wilhelm, and complained that he was using more water than belonged to him, and that witness would not stand it; that he, witness, was entitled to one-half the water; that then Wilhelm stopped one of his wheels until the head gathered."

The offer was objected to by the defendants, admitted, and a bill of exceptions sealed.

The witness testified in accordance with the offer.

There was other evidence for the plaintiff, corresponding with all that stated above; also, that when the water was flush, Lindeman, defendant and his predecessors used more than one-half without objection; that the plaintiff's mill did not require so much water as the defendants'; that the dam had been kept up by both parties. Defendants gave evidence that the dam leaked; that there was enough water in the creek to drive two mills, if the dam were tight; that there never had been any restriction to the use of the water by either owner; that, in 1865, the water being low, the plaintiff was told that the dam must be graveled; he promised to furnish some hands toward doing it, but did not.

The defendants proposed to ask a witness: "What is the capacity of the Conodogninet creek at Bucher's mill, ten miles by the stream above Lindeman's mill?" "How many pair of burrs are run?" To show that at Bucher's mill, constructed on the same principle as that of defendants, there is always sufficient water to drive two wheels, such as those of plaintiff and defendants, and to be followed by proof that large streams of water enter the creek below Bucher's mill, and above plaintiff's and defendants'.

The plaintiff objected; the evidence was rejected, and a bill of exception sealed.

The plaintiff's points, with the answers, were:

1. The agreement of the original owners, Whisler and Rupp, followed by repairing the dam at the mutual and equal expenses of the holders of the respective titles, still makes the basis of the rights of the parties, and Lindeman cannot use more than one-half of the water to the prejudice of the opposite owner.

Answer. "We answer this in the affirmative, unless you find that Lindsey, by his own conduct, deprived himself of the benefit of half

the water, by refusing to join Lindeman in repairing the dam, and thus, by his own neglect, permitted it to become leaky, or his forebay and gate to become in such bad repair as unnecessarily to waste the water, which he ought to have applied to propelling his wheels."

2. The condition of the dam is no excuse for Lindeman using more than his proportion of the water. The agreement and subsequent conduct of the holders of the respective titles, in paying for repairs, fix their respective rights, and are not meant for a good dam only, but for the water as found in that dam, and even if Lindsey refused to do his share of the repairs of the dam, yet Lindeman had no right to the whole, as he could have repaired and charged Lindsey with the one-half of the expenses.

Answer. "We cannot answer this point as requested. If Lindsey refused, after request, to join Lindeman in repairing the dam, and by such neglect and refusal the dam became leaky, and the water in the dam was insufficient to propel the mill, he cannot avail himself of his own wrong to recover for his own neglect, if the water permitted to escape would have given Lindsey his equal share if he had joined Lindeman in repairing the dam when requested. But if the leaky condition of the dam was owing to the mutual neglect of both parties, and Lindeman never requested Lindsey to join him in repairing the dam, then if Lindeman used more than half the water retained in the dam in its leaky condition, to the injury of Lindsey, Lindeman would be responsible for any damage sustained by Lindsey."

3. If the parties adhered to the agreement in paying for the repairs, and recognizing it in paying expenses, no statute of limitations will apply, nor a legal presumption arise, and the rights of the parties to the water continued the same.

Answer. "If the parties adhered to the agreement as stated in this point, the legal presumption, arising from lapse of time, would not arise."

The first three points of the defendants asserted that the form of action should have been covenant, and that the plaintiff could not recover in case. The court denied these points.

Their other points, with their answers, were :

4. If the jury believe that, for a period of twenty-one years prior to the bringing of the present suit, the owners of defendants' mill have been in the habit of using the water at their mill, without any

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restriction as to time and quantity, then they had acquired a right to an unrestricted use of the same, and the verdict should be for the defendants.

Answer. "As a legal proposition this point is correct. A use of a privilege for twenty years will, in law, raise the presumption of a grant. But, in this case, there is a written agreement defining the rights of the parties. By that agreement each party was entitled to one-half of the water in the dam. The evidence shows, we think, that defendants' mill required more water to operate it than the plaintiff's mill. If, prior to the use of the water of the stream in 1869, of which plaintiff complains, both parties had sufficient water for the use of their respective mills, and Lindsey, and those under whom he claims, had a sufficiency of water for the use of their mill, and received no injury by the owners of the opposite mill using more than one-half of the water, this would not confer on Lindeman, or those under whom he claims, a right to use more than one-half the water; if, in doing so, the mill of Lindsey was injured by reason of defendants appropriating more than half the water to the use of their mill. A party cannot be deprived of a right by not complaining before he has been injured by a deprivation of the right."

5. If the owners of defendants' mill have been in the habit of using, for twenty-one years and upward, prior to the commencement of this suit, all the water needed for grinding wheat and running their machinery, irrespective of the stage of the water, then plaintiff has no reason to complain of defendants, if, during the year 1869, they used no more water than necessary for this purpose, although they ran their mill both night and day.

Answer. "We cannot answer this as requested, for the reasons stated in our answer to the fourth point."

6. If the jury believe that, for a period of twenty-one years prior to the commencement of this suit, the owners of the two mills, plaintiff's and defendants', were in the habit of using, without complaint, all the water that they needed, or that they could get upon their wheels, and at such times as they needed it, or as the pressure of business required it, then neither has a right to complain of the other, if at any time he should use more than half the water in the dam, so long as the natural channel of the stream is not interfered with, nor a greater amount of water taken by either than he

has been in the habit of using during the said period of twenty-one years.

Answer. "We cannot answer this as requested. If neither party was injured by the manner in which the water was used until shortly preceding the time when this suit was brought, a party cannot forfeit a right by not complaining before he is injured."

7. The undisputed evidence in the case, and the evidence of the plaintiff himself is, that, for a period of twenty-one years, prior to the bringing of this suit, both mills have been in the habit of running at such times as their business required it, night and day; and, therefore, each has now the right to run as his business requires, and no cause of action will accrue to either party if, during a time of low water, one should be compelled by his business to run night and day, and thus take more than half the water in the creek.

Answer. "We cannot answer this point as requested, for the reasons stated in our answers to the former points. The evidence referred is for the jury."

The verdict was for the plaintiff for \$75.

The defendants took a writ of error, and assigned errors, *viz.*:

1 and 2. The rulings as to the evidence.

3-5. The answers to the plaintiff's points.

7-13. The answers to the defendants' points.

S. Hepburn, Jr., for plaintiffs in error. Covenant and not case was the proper and only remedy upon the agreement between Whisler and Rupp. Angell on Water-courses, § 441; *Wilbur v. Brown*, 3 Denio, 356; *Luckey v. Rowzee*, 1 A. K. Marsh. 295; *Savage v. Mason*, 3 Cush. 500. The rights of the parties were not fixed by that agreement. Long usage could alter or modify it as well as destroy it; and the fact, whether there had been such usage, was for the jury. *Strickler v. Todd*, 10 Serg. & Rawle, 69; *Richards v. Elwell*, 48 Penn. St. 361; *McCallum v. Germantown Water Co.*, 54 id. 59; Angell on Water-courses, §§ 135, 428, 429, 432; *Young v. Spencer*, 10 B. & C. 145; *Hobson v. Todd*, 4 Term R. 71; *Pastorius v. Fisher*, 1 Rawle, 27. If the water in the dam was wasted by the mutual negligence of the parties, both were contributors to their own injury, and neither could recover. *Catawissa Railroad v. Armstrong*, 49 Penn. St. 193; *Little Sch. Nav. Co. v. Norton*, 24 id. 469. The offer of plaintiff was not evidence for any purpose, and that of defendant was proper in answer to plaintiff's evidence. The court

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should not have determined the fact in answer to defendants' fifth point, and should have answered the question of law presented in it. Angell on Water-courses, § 100.

W. M. Penrose and Henderson & Hays, for defendant in error. As to the form of action. *McCall v. Forsyth*, 4 W. & S. 179; *Nickle v. Baldwin*, id. 290; *Smith v. Seward*, 3 Penn. St. 342; *Ingles v. Bringhurst*, 1 Dall. 346; *Marlin v. Willink*, 7 Serg. & Rawle, 297, 298; *Findlay v. Keim*, 62 Penn. 112.

SHARSWOOD, J. Seven points were presented by the plaintiff in error to the learned judge below, and thirteen errors have been assigned here. All these assignments may be disposed of by the consideration of two questions, neither of which seems to us to present any serious difficulty. The first is: What was the legal right of the plaintiff below? And the second: If his right was infringed, did he adopt the proper form of action as his remedy to enforce it? Every other question in the cause appears to have been a question of fact for the decision of the jury and properly submitted to them.

When the proprietors of two opposite banks of a stream of water are desirous of enjoying the advantage of the water-power for propelling machinery, a dam for that purpose cannot be built, except by mutual consent, unless, indeed, it may be what is termed a "wing-dam," confined to the soil of the person who erects it, or that half of the bed of the stream which belongs to him. If erected by either, on the land of the other, it would clearly be a trespass, and could lawfully be abated by him upon whose land it was built without his consent. When, therefore, they enter into an agreement to erect such a dam, with a covenant for themselves, their heirs and assigns to repair or rebuild it if necessary, it is not a personal covenant merely, but runs with the lands of the respective proprietors, and the stipulations contained in such agreement, in respect to the enjoyment of the water-power created by the dam, form the basis of their respective rights. It is sufficient to refer to *Jamison v. McCredy*, 5 W. & S. 229, as a case entirely parallel if not in point. If the instrument contains the grant of an easement or privilege to either party in the land or the water, against such a grant, there is no statute of limitation without actual hostile and adverse possession, and certainly no prescription or presumption from mere non-user. Nothing less than

an absolute denial of the right, followed by an enjoyment inconsistent with its existence for a period of twenty-one years or more, can amount to an extinguishment of it. In *St. Mary's Church v. Miles*, 1 Whart. 229, it was decided that, in the case of the reservation of a ground-rent by deed, no length of possession of the land, without payment of the rent, would raise the presumption that it had been released or extinguished. "Although it may be," said Mr. Justice KENNEDY, "that the law will, in some cases, presume a grant in support of a right which has been exercised and enjoyed by a person, without objection or interruption, to the exclusion of all others, for a period of twenty years or more, yet it does not follow that it ought to make such a presumption, in order to defeat a person of a right created by deed and not controverted, without any thing being shown to have taken place in the conduct of the parties interested or concerned in the right that was inconsistent with the existence and enjoyment of it." To the same effect is *Butts v. Ihrie*, 1 Rawle, 218; *Nitzell v. Paschall*, 3 id. 82. It is entirely in accordance with reason and the fitness of things that such should be the law. A man ought not to be obliged, unless he requires it, actually to use a right or privilege secured to him by deed, nor to resort to legal proceedings unless his title is denied, and he is actually ousted, disseized, obstructed or prevented by some wrong-doer from an enjoyment of it when he requires and demands such enjoyment. Hence, the learned judge below was perfectly right in his answers to the points of the plaintiff in error, so far as they set up a title by prescription in him, arising from the mere non-user by the grantor, or those claiming under him, of the right secured by the agreement between the former owners, Rupp and Wisler, dated April 17, 1820. If the plaintiff below had ceased to require the water at all, if he had abandoned the use of his mill entirely, and the defendant and those under whom he claimed had enjoyed all the water for any period of time, without denial of the right under the agreement or repudiation of its existence and obligations, he could resume his right at any time, certainly as long as his mill was there. On the other hand, the opposite party could acquire nothing by prescription, contrary to the terms of the agreement under which the dam was built, and was to be repaired and maintained. It would, perhaps, make a different case if the plaintiff below or those under whom he claimed had refused to perform their part of the agreement to contribute in equal proportions to the maintenance and

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repair of the dam. In this respect, the plaintiff in error has no cause to complain of the answers of the court below. Certainly mere neglect to do so, much more when both parties are equally negligent, would not cause a forfeiture of the privilege or easement vested by the deed. It is an entirely different case from that of an injury arising from negligence or other wrongful act, where, if in an action to recover damages, any concurrent negligence which at all contributed to produce the injury appears in the plaintiff, he can recover nothing. The covenants to repair were mutual; either party could repair and sue the other for contribution. The defendants could show that they had called on the plaintiff to repair, and he had refused or neglected after such demand. So the learned judge instructed the jury in his answer to the plaintiff's first point. The agreement secured to the plaintiff one-half of the water in the dam, much or little, unless it was reduced by his own fault. The joint erection and maintenance of that structure could be referred to nothing but contract. There was no right to build it, or obligation to maintain it, independent of contract. The contract of the parties, then, was the law of its use and enjoyment. The learned judge below was, therefore, entirely accurate in his instructions to the jury, contained in his answers to the several points of the plaintiff and defendants which have been assigned for error, so far as they relate to the plaintiff's title to the free and undisturbed use and enjoyment of one-half of the water in the dam in question. It is unnecessary to examine them separately and in detail, as the application of the principles to which we have referred will evince, we think, that the assignments of error cannot be sustained.

The same principles show also that the learned judge was right in his rulings upon the admission and rejection of evidence, which were excepted to and form the subjects of the first and second assignments of error. It was competent for the plaintiff to prove that he had made a demand for the enjoyment of his right when obstructed, and that it had been yielded by the occupant, whether owner in fee or tenant. It was like an entry to toll the statute. It interrupted the prescription set up by the defendant. It was in disproof of the pretension that he had lost his right by non-user or non-claim. If I have a right of way by grant or reservation, I can surely give evidence that I have claimed and used it without denial or obstruction by the occupant of the land. This evidence is not to make out a right against the lordlord from acquiescence by the tenant in the

use or enjoyment of the property adverse to his title. This, certainly the acts or declarations of the occupant or tenant are incompetent to effect, and are, therefore, in such a case, inadmissible; but this rule does not apply where the object is to meet and disprove the assertion that a right depending upon express grant has been lost or abandoned. The distinction between these two cases is very apparent. So, too, it was totally immaterial whether the amount of the water in the dam was sufficient, if the dam had not leaked, to run both mills; and even if it had been, upon the supposition that the jury might find that the plaintiff had refused to repair upon demand, of which, however, there seems to have been no evidence to go to the jury, the mode proposed to prove it was entirely inadmissible. The fact that mills higher up the stream were run with a less amount of water would have introduced questions entirely collateral and irrelevant as to the mills on the Conodoguinet, from its source to its mouth. The plaintiff below was entitled, by the agreement of 1820, to half of the water in the dam, not merely to so much as was necessary to run his mill; the parties had wisely precluded all dispute on that subject, by making the grant perfectly definite. When he was denied and disturbed in the enjoyment of that right to his injury by the act of the defendants, in actually taking and using more than half, so that, necessarily, half was not left for him, it was no answer to say that he had as much as he needed to run his mill. In point of fact, the injury he suffered, and for which he recovered damages was, that he had not as much as was necessary for that purpose.

The remaining errors relate to the form of action. It is contended that it should have been covenant on the agreement of 1820. But here there is a very plain distinction to be taken. Had there been in that agreement a covenant by Rupp, for himself, his heirs and assigns, not to take more than half the water in the dam, there might have been some plausibility in the contention that he must resort to his remedy upon that. But there is no such covenant in the instrument. The covenants relate to the construction and repair of the dam, and in regard to an application for a private road. Upon the breach of any of these covenants, the remedy would have been by action of covenant upon the agreement. But in regard to the easement or privilege of Whisler, his heirs and assigns, to take and use one-half of the water, it was a direct grant, not a covenant. "And in case the said John Whisler, his heirs or assigns, should erect a mill, they shall be at liberty to use one-half

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of the water in the said dam." No one has ever supposed before, that upon a grant by deed of an easement, or privilege upon land or land covered with water, by one man to another, the remedy for a disturbance of such easement or privilege was an action of covenant upon the deed. Take a common case of the grant or reservation of a right of way. Surely, an action on the case may be maintained by the grantor for the obstruction of it, as well against the grantee and those claiming under him as against strangers. The books are full of such cases in which no such point was made. *Watson v. Bioren*, 1 S. & R. 227; *Kirkham v. Sharp*, 1 Whart. 333; *Jamison v. McCredy*, 5 Watts & Serg. 129; *Van Meter v. Hankinson*, 6 Whart. 307; *Ebrier v. Stichter*, 7 Har. 19. But, contends the counsel for the plaintiffs in error, with great ingenuity, the grant to Whisler, of one-half of the water, is an implied covenant that the grantor will not take the other half. True, it is so, in popular language, but that does not constitute a technical covenant. In the grant of a right of way or common in the grantor's land, there is the same implied covenant by the grantor that he will not disturb its enjoyment. But that, as we have seen, does not prevent the plaintiff from resorting to an action on the case to recover damages for its disturbance.

Judgment affirmed.

LEFEVRE'S APPEAL.

(99 Penn. St. 122.)

Partnership — real estate paid for by firm funds, when no resulting trust.

Real estate was purchased by G. S. and J. G. in their individual names. Subsequently, they formed a partnership with J. S., under the name of G. S. & Co. The cash payment, on account of purchase-money of the real estate and the first installment, were paid before J. S. became a partner. He acquiesced in the subsequent appropriation of the firm funds to the payment of the balance, and to expenditures made in improvements, knowing that it stood in the individual names of G. S. and J. G. It was agreed by parol that G. S. was to have one-third of the real estate as soon as there was a final settlement. *Held*, that there was no resulting trust for the partnership, and the real estate having been sold under execution, the fund arising from the sale should go to the individual creditors of G. S. and J. G., instead of the creditors of the firm.

APPEAL from the court of common pleas of Cumberland county.

The proceedings in the court below were in the distribution of a fund arising from a sheriff's sale of real estate, under an execution at the suit of the Goodyear Rubber Belting and Packing Company against Gilson Smith, John Smith and John Gribble, trading as Gilson Smith & Co. The fund was claimed by the creditors of Gilson Smith & Co. as the proceeds of partnership property of the firm, and by the individual creditors of Gilson Smith and John Gribble as the individual property of Smith and Gribble.

The distribution was referred to M. C. Herman, Esq., as auditor, who reported, "That Gilson Smith and Gribble, in 1846, began the business of manufacturing threshing machines, which they carried on under the name of Gilson Smith & Co., until 1852, when they rented the property in dispute, having a foundry erected on it.

"There they associated with themselves George Tarman, and began and carried on the foundry business, under the name of 'Smith & Tarman,' and here, also, they continued their old business, under the old name of 'Gilson Smith & Co.' George Tarman never was a member of the firm of Gilson Smith & Co. He was only a partner in the foundry. In 1854, two years after they had rented, Gilson Smith and John Gribble purchased and obtained the *fee simple* title to this foundry property, for which they were to pay \$1,500; of which they paid \$500 on the delivery of the deed, and the balance in three annual installments, for which they gave their obligation in writing, and on which judgment was entered to No. 132, of April term, 1854, against 'John Gribble and Gilson Smith,' in favor of 'Barnet A. Wolf.' On the 19th of June, 1857, this judgment was satisfied in full. The deed is dated May 5, 1854, and is from B. A. Wolf and wife, to 'John Gribble and Gilson Smith, and their heirs and assigns,' etc. The deed has never been recorded. George Tarman retired from the firm of 'Smith & Tarman,' in 1855, after which, in the same year, John Smith was admitted as an equal partner in the foundry, and the following year, in all the business, both in that of the foundry and the manufacture of agricultural implements. From the time of the admission of John Smith, the entire business was carried on in the name of 'Gilson Smith & Co.,' until the time of the sheriff's sale, on the 11th of March, 1870. After the purchase of the property, machine-shops were erected on it, improvements made, and the business of the firm of 'Gilson Smith & Co.' enlarged and increased.

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"Some of the money thus expended in building and improvement came out of the firm business and part out of the separate estates of Gilson Smith and John Gribble. During the first year of John Smith's association with the firm, he worked at the manufacture of reapers as a laborer, and received wages for his services; but, after the first year, when he became a full partner in all the business, he received an equal share of all the profits as an equal partner. The balance of the purchase-money, \$1,000, due on the property, was paid out of the proceeds of the business, the last two installments of which were paid after John Smith became a member of the firm. John Smith never paid any thing for his interest in the partnership. George Tarman paid nothing when he went in and received nothing for his interest when he went out, except that the remaining members of the firm assumed the firm indebtedness. Improvements, to the value of about \$300, were made on the property before the admission of John Smith. Gilson Smith says, in his testimony: 'John talked about purchasing a deed of the real estate; he never did purchase; * * * there was never any definite arrangement about John Smith taking a share of the real estate; we never had a final settlement; it was agreed that he was to have one-third of the property as soon as we had a final settlement, and he paid for it; John Smith never paid any rent, and no rent was asked for it; * * * we never had any regular settlement; we just run the business along, kept our families, and kept up the repairs out of this business; * * * the expenses of keeping up the business, as far as they were paid, were paid out of the business.' Again he says: 'John Smith never paid me any rent for his interest in the property; I think we would have required him to have made up his proportion of the rent, if on a final settlement he would have taken an interest in the real estate; there was no positive contract about him taking a share in the real estate; two years ago he became dissatisfied with the way the business was being carried on, and he said he wanted to know what he was doing, or going to do, or something to that amount; we told him, if he would go on, and we would have a settlement, why, of course, he could have a one-third interest, if it was coming to him.' At the first triennial assessment, made after the purchase of the property, it was assessed as the property of 'Smith & Gribble,' and continued to be so assessed down to the time of the sheriff's sale."

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He awarded the fund to the individual creditors of Gilson Smith and John Gribble.

Upon exceptions, the court of common pleas confirmed the report of the auditor.

David Lefevre, one of the creditors of Gilson Smith & Co., appealed and assigned for error the confirmation of the auditor's report.

F. G. Sadler (with whom was *L. Todd*), for appellants, cited *Lacy v. Hall*, 1 Wright, 360; *North Pennsylvania Coal Co.'s Appeal*, 9 id. 181; *Hozie v. Carr*, 1 Sumn. 190; *Bank v. Myley*, 1 Har. 544; *Abbott's Appeal*, 14 Wright, 234; Pars. on Cont., vol. 1, ch. 12, § 2; 3 Kent, 38; *Smith v. Smith*, 5 Ves. 189.

J. A. McCune and *W. H. Miller* (with whom was *J. R. Miller*), for appellee, cited *McCormick's Appeal*, 7 P. F. Smith, 59; *Hale v. Henrie*, 2 Watts, 143; *Ridgway, Budd & Co.'s Appeal*, 3 Harr. 177.

SHARSWOOD, J. The subject of partnership in real estate was before this court in the early case of *McDermot v. Laurence*, 7 Serg. & Rawle, 438, and the principles of law in relation to it, enunciated and explained by chief Justice TILGHMAN in a luminous and exhaustive opinion. He examined all the authorities in England and this country, and the conclusion at which he arrived was, that as to strangers — purchasers, mortgagees and creditors — the agreement of partners, to make real estate part of the common stock, must be evidenced by writing, and that it ought to be put on record, so as to give notice to the world; otherwise, where the deed is in their individual names, they will hold as tenants in common. The decision in this case was affirmed and applied in *Hale v. Henrie*, 2 Watts, 143; *Lancaster Bank v. Myley*, 1 Harris, 544; *Ridgway, Budd & Co.'s Appeal*, 3 id. 177; *Kramer v. Arthurs*, 7. Barr, 170. In *Lacy v. Hall*, 1 Wright, 360, and *Erwin's Appeal*, 3 id. 535, the land was bought by one partner in his own name with partnership funds; and it was held that the equitable interest was in the firm, and, in the latter case, the proceeds of a sheriff's sale were distributed accordingly. "Had the title," said Mr. Justice STRONG, in *Erwin's Appeal*, "been taken to both Imhoff and Myers without any assertion on its face that it was treated by them as partnership property, under the ruling in *Hale v. Henrie*, 2 Watts, 143, and several subsequent cases, they would have been but tenants in common; the

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absence of such an assertion would have been evidential that the parties did not intend to bring the property into partnership stock, but that they intended to take separate interests." The principle of these cases was, that such a purchase by one partner raised a resulting trust which was within the exception of the statute of frauds, and that the former cases, grounded upon the provisions of that statute, did not apply. It would, of course, follow logically, that when a partnership consisted of three or more, a purchase with partnership funds, in the names of two or any less number than all, would on the same reason inure beneficially to the firm. It is to be remarked, however, that in these cases there was nothing from which it was to be inferred that the other member of the firm acquiesced in the appropriation of the common funds to the purchase in the name of the individual member. For him to claim to hold it as his private property, without the consent of his associate was, in fact, a fraud. Partners have an unquestionable right to deal with the funds of the firm as they please; and if, with their consent or knowledge or acquiescence, a portion of their funds is applied to the purchase of real estate in the name of an individual member, and as his private property, there is in such case no resulting trust. The partners may agree among themselves, that any one member may withdraw any part of the common stock, and such part will then become his own; and it matters not how he invests it, even though it be in real estate to be used for the purposes of the firm. He is charged or chargeable with what is so withdrawn and appropriated in account. So if, with the knowledge and consent of all the partners, partnership funds are applied to the improvement of the real estate of one or more members of the firm, the equity of the joint creditors can only be worked out through the equities of the respective partners. It is because each partner has an equity to insist upon the application of the partnership property in the first instance to the payment of the firm debts, for which each is liable *in solido*, that the joint creditors have any preference or priority over the separate creditors of each. When the partners, during the continuance of the firm, have all agreed to the appropriation of the funds, to the purchase or improvement of real estate in the private name or names of one or more of the partners, no one of them has any equity to have such property applied to the joint debts; and it follows that the joint creditors have no such equity. It is contended, however, that in *McCormick's Appeal*, 7 P. F. Smith, 54, a different

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principle is laid down, and that in all cases, when during the existence of the partnership the funds of the firm are applied to the purchase or improvement of real estate, there is a resulting trust for the firm. If such be the doctrine of that case, it would overrule *Hale v. Henrie*, and the subsequent cases cited, which it not only does not profess to controvert or even doubt, but on the contrary expressly approves and affirms them. In *Hale v. Henrie*, the purchase was by the two partners during the partnership with the partnership funds; and Mr. Justice SERGEANT said: "No averment of any right by parol, or by, what is still less, the nature of the fund which pays, or the uses or purposes the property is applied to, can be allowed to stamp a character on the title inconsistent with that appearing on the deed and record to the prejudice of third persons." And again, he uses this language, which is directly applicable to the present contention:

"The money with which Capp and Henrie purchased the property was their own. They could appropriate it as they pleased, and they choose to appropriate it to a purchase for themselves individually, and not as partners. Having done so, it cannot be defeated by proving otherwise than by deed or writing that they held as partners."

In *Ridgway, Budd & Company's Appeal*, the deed was to the partners, in the firm name, but expressly as tenants in common; it was bought during the partnership, and with the partnership funds, and it was, nevertheless, held, that, when partners intend to bring real estate into partnership, their intention must be manifested by deed or writing placed on record; and it is not competent to show, by parol evidence, that real estate conveyed to two persons as tenants in common was purchased and paid for by them as partners, and was partnership property. "This is finally settled," said Mr. Justice ROGERS, "in all such cases parol testimony is totally disregarded." In *McCormick's Appeal*, Mr. Justice STRONG, indeed, said: "Undoubtedly a partnership may hold real estate, and they may have a resulting trust when the partnership funds have paid for land. Such was the case of *Erwin's Appeal*, 3 Wright, 535. So there may be a constructive trust in favor of a firm, as was held in *Lacy v. Hall*, 1 id. 360; but these come within the exceptions to the statute of frauds. In both these cases the lands were acquired after the partnership had been formed, and while the joint business was in progress. But here there is no resulting or constructive trust

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The agreement, if there was any, to put the land into the joint stock, was made before the firm had any being, and the partnership funds did not pay for it. A parol agreement to put land into a firm, or to consider is as firm property, made before the firm exists, is wholly ineffectual to pass a title either in law or equity." It is clear that he did not mean to hold, that when without fraud, but with the knowledge and consent of all, partnership funds are applied to the purchase or improvement of the private property of one or more of the individual members of the firm, there would be a resulting trust for the firm, of which the joint creditors could avail themselves.

According to the facts of this case, as reported by the auditor in the court below, the real estate, the proceeds of which were in court for distribution, was purchased by Gilson Smith and John Gribble in their individual names, before the formation of the firm of Gilson Smith & Co. The cash payment on account of the purchase-money, and the first installment, were paid by them before John Smith became a partner. He acquiesced in the subsequent appropriation of the firm funds to the payment of the balance, and to the expenditures made in improvements, knowing that it stood in the individual names of Gilson Smith and John Gribble. The money so taken and applied, if not actually charged, would be chargeable against them on final settlement. It was expressly agreed that John Smith was to have one-third of the property as soon as there was a final settlement, and he had paid for it. This parol agreement gave him no title, and, if it did, it would be as an individual. There was certainly nothing in this which would create a resulting trust for the partnership; and the distribution reported by the auditor, and decreed by the court below, was, therefore, perfectly right.

Decree affirmed and appeal dismissed at the costs of the appellant

First National Bank of Bellefonte v. McManigle.

FIRST NATIONAL BANK OF BELLEFONTE, plaintiffs in error, v.
McMANIGLE *et al.*

(60 Penn. St. 156.)

Evidence — mailing letters, how far evidence of receipt.

There is no presumption of law that a letter, mailed to one at the place he usually receives his letters, was received by him. Proof that money was inclosed by the postmaster at M., in an envelope directed to the cashier of a bank at B., and then inclosed in a registered envelope directed to the postmaster of B., and deposited in the mail bag for the post-office at B., is not sufficient to justify a jury in finding that the bank received the money.

ACTION on a promissory note of \$500, A. F. Alexander, maker, brought by the First National Bank of Bellefonte, indorsee, against McManigle and Brown, indorsers. The note in suit was in renewal of like amount. The only question of importance in the case was whether there was sufficient evidence that \$300, claimed by defendants to have been paid upon the original note, was ever received by plaintiff. Upon this point, the opinion is sufficiently clear.

Verdict for plaintiff for \$206.90. Plaintiff being dissatisfied with the amount of the verdict, took out a writ of error.

Elder & Reed, for plaintiff in error.

Alexander & Woods, for defendants in error.

WILLIAMS, J. Under the defense set up in this case, the burden of showing that the note in suit was given in renewal of a previous note for the same amount, on which the maker had paid \$300, was on the defendants. If the bank authorized the maker to send the money by mail at its risk, then proof that it was inclosed in a letter properly directed and put into the post-office would be *prima facie*, and, if not rebutted, sufficient evidence of payment. But if the bank did not request or authorize it to be sent by post, then the maker, in sending it by mail, took upon himself the risk of its loss by the way, and, if it was not received by the bank, its deposit in the post-office was no payment. We have not been furnished with a copy of the cashier's letter of the 4th of April, 1868, authorizing a renewal of the note for the residue on

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payment of a part thereof, but, from the answers of the court to the plaintiff's second and third points, we are, perhaps bound to presume that it did not authorize the maker to remit the money by mail at the risk of the bank. If so, was proof that the money was inclosed by the postmaster at Milroy in an envelope directed to the cashier of the bank at Bellefonte, and then inclosed in a registered envelope directed to the postmaster at Bellefonte, and deposited in the mail-bag for that place, sufficient evidence to justify the jury in finding that the bank had received it? There is no presumption of law that a letter, mailed to one at the place he usually receives his letters, was received by him. A strong probability of its receipt may arise, as was said in *Tanner v. Hughes*, 3 P. F. Smith, 289, and the fact of its deposit in the mail-bag, in connection with other circumstances, may be sufficient to warrant the court in referring the question of its receipt to the determination of the jury. The only other possible circumstance in this case, tending to show that the bank received the money, is the fact that the cashier, who was examined as a witness on behalf of the bank, was not asked whether he had received it or not. But if the evidence given by the defendants did not make out a *prima facie* case of payment, the plaintiff was not bound to prove a negative. If the letter inclosing the money had been mailed directly to the cashier, the jury might possibly have been warranted in finding that it was received by the bank. But it was not mailed directly to the cashier, but to the postmaster at Bellefonte, and it could not have been received by the bank, except at the hands of the postmaster or one of his deputies; and, under the regulations of the post-office department, it would not have been received by the bank without the receipt of the cashier in a book provided by the department, and kept by the postmaster for that purpose. If, then, the bank received the money, the defendants had it in their power to show its receipt, not only by the postmaster at Bellefonte, but by the production of the cashier's receipt; and they were bound to give the best evidence in their power, and not leave to conjecture a fact which, if true, was susceptible of direct and positive proof. Under the circumstances, it is clear that the evidence of the bank's receipt of the money was not sufficient to justify the court in submitting the question to the jury. The maker of the note virtually constituted the postmaster at Milroy and the postmaster at Bellefonte his agents for the transmission of the money, and he was bound to call and examine the latter before he

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had the right to ask the jury to find that the bank had received it. As it was, the jury were left to infer from the deposit of the registered letter at Milroy, in the mail-bag for Bellefonte, its receipt by the postmaster of that place, and his delivery of the letter inclosed in the registered envelope to the cashier of the bank to whom it was addressed. They were allowed to make this double inference, and to find that the bank had received the money, not only without any direct proof of the fact, when the means of positive proof were in the defendant's power, but in the face of the fact that the maker had subsequently given, and the defendants had indorsed, two notes of the same amount in renewal of the note on which the money sent by mail was to be applied. The giving of the renewed notes was tantamount to an admission that the money had not been received by the bank, and there was no evidence tending to rebut the admission. The court was, therefore, in error in submitting the question of its receipt to the determination of the jury. (The judge here disposed of an unimportant question of evidence.)

Judgment reversed, and a venire facias de novo awarded.

RUDY, plaintiff in error, v. ULRICH *et al.*

(99 Penn. St. 177.)

Will—undue influence—revocation.

The unlawful cohabitation of a testator with the mother of an illegitimate child, a legatee in the will, is not of itself sufficient evidence to justify a jury in finding undue influence on the part of the mother. Where a second will is found to be invalid, with the exception of the clause of revocation, on the ground of undue influence, the clause of revocation alone is not sufficient evidence of the testator's intention to revoke a former will. The presumption is that, if the second will is found to be invalid, the testator intended that the first will should stand, rather than that he should die intestate.

ISSUE *devisavit vel non*, directed by the court of common pleas under a precept from the register, to try whether a certain paper writing was the will of John Yerkes, deceased. The parties were Jacob Rudy, guardian of David Yerkes (an illegitimate son of the

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testator), plaintiff, and Elizabeth Ulrich (daughter of the testator) and Isaac Ulrich, her husband, and Polly Bordner (also daughter of the testator) and Isaac Bordner, her husband, defendants. The will had been lost after the death of the testator. The first two questions directed by the issue related to the existence and contents of the will, and the other two questions related to the capacity of the testator and to the exercise of undue influence over him by the mother of the illegitimate son, or any other persons. By this will, which was made in 1865, it was proved that the testator made the following disposition of his property:

"I give and bequeath unto my son David, my real and personal estate, which shall be sold by the executor (hereafter provided), who shall pay the money into the hands of a guardian to be appointed for my son David; he shall also have the best bed in my possession, and if at any time he becomes competent to manage his own affairs, one-half of the money shall be paid into his own hands; he shall also be put to a place where he will be kept cheapest and best."

The defendants introduced another paper, dated August, 1868 purporting to be a will of the same testator, of which the following are some of the provisions:

"*Item.* It is my will, and I do order and direct, that my son David and Catharine Rudy shall have all my property, both real and personal, equally among them as long as they both live, and if any thing is left after their deaths, then the children of my daughter Polly, wife of Isaac Bordner, shall have the balance equally divided among them.

"My real estate shall not be sold as long as Catharine Rudy lives.

"I make, constitute and appoint Jacob Wolf to be the executor of this my last will and testament, hereby revoking all former wills by me made."

Defendants proved that when the testator made the will of 1869 he was of sound mind, and that he then said he wished to revoke all former wills. Plaintiff then showed that the will of 1869 had been declared invalid by a competent tribunal, on the ground of undue influence exercised over him by Catharine Rudy. Evidence was introduced showing that David Yerkes was helpless and idiotic; could not walk or talk, or take his own victuals, which had to be put into his mouth with a spoon, and that there was no prospect of his improvement. The testator's estate was worth about \$2,800. It appeared that the wife of the testator died many years before,

and that Catharine Rudy then came to live with testator, and while living with him she gave birth to the child David, which he recognized as his own.

The third point of the plaintiff was:

"The fact that Catharine Rudy and the testator cohabitated together at the time the will was made, as stated by the witnesses — neither of them being then married — is not of itself sufficient to justify the inference that undue influence was used in procuring the will in question, particularly as the testator acknowledged that the beneficiary under the will was his son, who is idiotic and helpless."

Answer. "The fact that these parties lived together in a state of concubinage for some fourteen years is well calculated to give her great influence over the decedent. This, together with the proof of Kate Rudy's conduct toward Yerkes, is well calculated to show that she had great influence over him, and may very readily have been used to induce him to make a will in favor of her child."

The court charged, among other things:

"On the 21st day of August, 1869, the decedent made another will, containing a clause 'revoking all former wills.' This, the defendants contend, puts an end to the one now set up, executed in 1865. To meet this, the plaintiff shows, that on an issue directed and tried in this court, and between these parties, that will was found to be invalid, and there is proof that its validity was impeached because procured through the undue influence of Kate Rudy. It was certainly more favorable to her than the present, as it gave her one-half of the estate and David the other half. A will may be void in part and otherwise valid, or it may be wholly invalid. If avoided by a judicial decision on account of incapacity of the decedent to make a will, or because not duly executed or proved, it is entirely invalid. If on account of undue influence, it may be good for those parts not inserted through that influence, and the other parts avoided. One bequest or devise may be good, when there is no reason to believe it was improperly procured, while other parts may be avoided. This doctrine is well settled in the books. Therefore, the clause revoking all former wills may have effect, while the bequests of the will may be avoided for undue influence. Whether the intention to make the will in controversy was the unbiased wish of the testator, or was brought about by the undue influence of Kate Rudy, must be decided by the jury. If she unduly influenced that clause, it will not have the effect to revoke the former will; if it

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was the uninfluenced wish of the testator, that will is revoked by the very words of the act of assembly. If she wanted the will of 1869 made for her benefit and that of her son, and to cut out Yerkes' legitimate heirs, she might very naturally wish to have the other revoked. It is entirely a question of intention, to be determined by the jury."

The verdict was for the defendants.

The plaintiff took a writ of error.

His sixth assignment was the part of the charge given above.

His seventh, the answer to his third point.

J. Funck, for plaintiff in error, as to the sixth assignment, referred to act of April 8, 1833, § 13, 14 Pamph. Laws, 257. This statute is to be strictly construed. *Clingan v. Micheltree*, 7 Casey, 36; *Kauffman v. Griesemer*, 2 id. 406; *Reid v. Borland*, 14 Mass. 208. Where a revoking clause is obtained by undue influence, it is no revocation of the former will. *Laughton v. Atkins*, 1 Pick. 535; *Price v. Maxwell*, 4 Casey, 39; *O'Neill v. Farr*, 1 Rich. 80.

D. Fleming (with whom was *C. P. Miller*), for defendants in error, as to the sixth error, cited *Beard v. Beard*, 3 Atk. 72; 4 Kent's Com. 590; 1 Jarman on Wills, 154, and cases cited; 1 Wms. on Ex'rs, 141; *Boudinot v. Bradford*, 2 Dall. 268; *Ellis v. Smith*, 1 Ves. Jr. 17; *Jones v. Murphy*, 8 Watts & Serg. 275; 1 Redf. on Wills, §§ 33, 37; *Barksdale v. Hopkins*, 23 Ga. 332.

SHARSWOOD, J. This was an issue of *devisavit vel non* in the court of common pleas on the precept of the register, before whom the copy of a paper-writing, alleged to have been lost, was propounded for probate as the will of John Yerkes, deceased. Ten errors have been assigned. We think that none of them have been sustained except the sixth and seventh. It will be unnecessary to consider the remaining assignments in detail. They present no questions which have not already been decided in *McTaggart v. Thompson*, 2 Harr. 154, and *Dean v. Negley*, 5 Wright, 312.

The plaintiff, however, was entitled to a direct affirmative answer to his third point. It was true, and the jury should have been so instructed, that the fact of the unlawful cohabitation of Catharine Rudy and John Yerkes was not, standing by itself, without other evidence, sufficient to justify them in drawing the inference, that

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undue influence had been used by her to procure the execution of the will in question. However it might have been if the entire property or the bulk of it had been bequeathed or devised to Catharine Rudy, and John Yerkes' own children disinherited in her favor — which was the state of the case in *Dean v. Negley* — yet the alleged will in this case was not of that character. John Yerkes undoubtedly believed David to be his own child, whatever the fact was. He always treated him as such, and calls him so in this paper. He was an idiotic, helpless boy — incurably so, beyond all hope of amendment — appealing, therefore, most strongly to every feeling of the heart of the parent to make such provision for the support and comfort of an unfortunate being whom he had been instrumental in bringing into the world. His estate was not large; real and personal it was only \$2,800; the interest of which, after deducting necessary charges, was not more than was required for this purpose. His other children were grown up, in the full enjoyment of their faculties, married and settled in life, and able to do for themselves. He directed the amount of his estate to be paid into the hands of a guardian to be appointed for his son, and if his son became competent to manage his own affairs one-half to be paid into his own hands, and, after his death, the balance to be equally divided between grandchildren, the children of his daughter Polly. It was a most reasonable, just and proper will under all the circumstances. Catharine Rudy had no personal interest in it, further than her natural affection for her child might prompt her to desire that some provision should be made for him. If she had brought it about by the influence of argument and persuasion, without the employment of undue means, it would have been unimpeachable on the mere ground of the unlawful relation she bore to the alleged testator. She could derive no interest from the bequest, except so far as it went to relieve her from the obligation of support. No court would have appointed her the guardian without requiring from her ample security. The presumption of undue influence did not, therefore, arise, as it would have done had the testament been clearly *inofficium*. The answer of the learned judge to the plaintiff's third point implied, indeed, that it was correct, but we think the plaintiff was entitled to an express affirmance of it. What was said in answer to it might, with great propriety, have been added as a qualification or explanation, that the relation Catharine Rudy bore to the alleged testator was well calculated to give her great influence over him,

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and, together with the evidence of her conduct toward him, might induce the belief that it had been unduly exerted in favor of her child.

We are of the opinion that the instrument dated August 31, 1869, was not evidence to the jury of revocation of the will now in contest, executed in 1865. It was, no doubt, rightly admitted when it was offered, objected to, and bill of exceptions sealed. It was offered, for all that then appeared, as a valid subsequent will, revoking all prior wills, and, of course, that in regard to which the issue on trial was awarded. No one can well doubt its admissibility in evidence at that time. But when the plaintiff in rebuttal had produced the record of the former issue, directed by the register's court to try its validity, and the verdict and judgment against that instrument, in which these defendants were the parties contesting it, it was no longer available for the purpose for which it had been introduced, and the jury should have been so instructed.

It may be freely conceded that admission to probate by the register was not necessary to give effect to the instrument of 1869 as a revocation of that propounded as the will of 1865; otherwise, the question between two wills could never be tried. It would be a race which could first be presented for probate. In the issue on either, the claimants under the other could be admitted to contest; and those under the second could undoubtedly set it up against the first, and the claimants under the first could impeach its validity. The act of assembly of April 8, 1833, §§ 13, 14, Pamph. Laws, 250. provides in effect that no will in writing shall be repealed otherwise than by some other will or codicil in writing, or by other writing declaring such repeal, executed and proved in the same manner as is provided in the case of an original will. There are two modes of revocation here pointed out, besides cancellation, obliteration, etc. First. Another subsequent will or codicil duly executed and proved; and Second. Some other writing declaring the revocation. It is implied that this other writing is not a will, that is, an act of disposition or declaration of what a man intends as to his property after his death. There may be a separate written revocation, not intended to take effect as a will or codicil, which need not, therefore, be propounded to the register for probate. This is a very reasonable provision. A man may be absent from home at a distance from the place where his will is deposited, or it may be lost or mislaid, so that he cannot have access to it to cancel

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or destroy it. He may wish, however, simply to abrogate it without making another will, and so die intestate. In such case, he may execute a paper declaring his intention, which, provided it is signed by him and proved by two witnesses, will be effectual. No probate of it in the register's office is necessary. No letters testamentary or of administration *cum testamento anexo* are required to be issued upon it. But the case is different when the revocation is contained in what purports to be a will disposing of property. The words of the act point to this: "Other writing," that is, writing other than a will. A subsequent will, without a revoking clause, as effectually repeals a prior will as with one. No doubt, as stated by the learned judge below, a will may be void in part and otherwise valid, or it may be wholly invalid. One bequest or devise may be good, while other parts may be avoided. But then it stands as a will for those parts which are good. A will propounded for probate may be contested in whole or in part. Had Catharine Rudy obtained possession of the paper, and fraudulently inserted a clause in her own favor, the jury, on the issue of *devisavit vel non*, could have found against that clause, but that with that exception it was the will of John Yerkes. The paper would then have stood as his will, and by its own force, with or without a revoking clause, would have revoked all wills prior in date. The difficulty, in the way of the application of the principles stated by the learned judge to the case in hand, is twofold, in part technical and in part substantial. First. The verdict and judgment in the former issue were against the will of 1869 as an entirety, and standing, unreversed, conclusive in this proceeding. The question of undue influence in obtaining that will, whether in whole or in part, could not be tried over again on this issue. Had it been found that any part of that paper was valid, not only the revoking clause but the appointment of the executor and the power of sale, it would establish it so far as a will, and overturn the former finding. If good as a will at all by the act of 1833, it revoked the former will. This is the technical difficulty. The substantial one is still more serious. It cannot be known with any degree of assurance, sufficient to justify a legal judgment, that where there is a clause of revocation in a will making a certain disposition of property, that the testator really intended to revoke a prior will making a different disposition, except for the purpose of substituting in place thereof that contained in the second will. It would be making the testator die without any will at all, when it

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was clearly his intention, as drawn from his executing a paper purporting to be a will, not to do so. In *Ex parte Ilchester*, 7 Ves. Jr. 348, the appointment of a guardian was revoked, and another guardian appointed by a will not executed according to law. By the English statute, a guardian may be appointed either by deed or will. The Master of the Rolls, Sir WILLIAM GRANT, said: "There can be no doubt that part of the intention was to revoke the appointment. But the question is, whether that was the substantive direct object, or only as an incidental and necessary part of the ultimate object, and whether it would ever have been entertained except with reference to that." And again: "I cannot conceive how an instrument inoperative in its direct purpose can give effect to an intention of which I know nothing but by that purpose." The soundness of this reasoning was acknowledged and applied by the supreme court of Massachusetts in a case of an instrument set aside and refused probate as a will, on the ground of undue influence. *Laughton v. Atkins*, 1 Pick. 535. It has been found, and indeed is conceded, that undue influence produced the will of 1869. To make it effectual, it was deemed necessary expressly to revoke all former wills, not in order that John Yerkes might die intestate, but in order to make way for that paper as an effective will. If that paper had been able to maintain its ground as a will, it would have repealed the will of 1865 without any revoking clause. It would have stood as the last declaration, complete in itself, and not an addition or codicil to any former instrument, of what disposition John Yerkes willed to be made of his property after his death. No revoking clause could make it stronger. If it was a will in whole or in part, it was his last will so declared to be, which necessarily overrode all prior ones. We know, however, that express clauses of revocation are inserted in most wills as a mere matter of form, the mere expression of which is inherently implied, as are many other parts, such as the direction that all just debts and funeral expenses shall be first paid and discharged. As evincing an intention on the part of John Yerkes to die intestate, unless the will of 1869 went into effect, that paper—executed, as it has been found, under undue influence—the very act of execution not the free exercise of his own volition—was no ground upon which any legal judgment could be rested. The parol evidence of what took place, at the time of the execution of the paper of 1869, did not help the case of the defendants. It had no tendency to show that unless that paper

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stood he wished only his lawful issue to have his property, according to the intestate laws, leaving his unfortunate illegitimate child wholly unprovided for. All that he said was that he wanted to make another will. If the execution of that paper was induced by the undue influence of Catharine Rudy, there is some difficulty in comprehending why this declaration made in her presence, and with the same view, is not within the same objection. There was no evidence to submit to the jury, either in the paper itself or any declaration made by him at the time that John Yerkes had any other object in revoking the will of 1865, than to substitute the disposition made by the will of 1869 for it. He had no intention to die intestate, but the contrary. The case of *Barksdale v. Hopkins*, 23 Ga. 332, relied on by the counsel for the defendants, is not to the point, and does not sustain his contention. It holds merely that if a will is before a probate court for probate, and a second will is pleaded as a revocation of the first, the probate court may take notice of the second, although it may be that the second is one which has not been admitted to probate, and one which is not offering itself for probate; consequently the probate court may hear proof touching the execution of the second. That is a proposition, it seems, too clear to be doubted, but it has no application to the present case.

We conclude, therefore, that the learned judge below erred in submitting to the jury the instrument called the will of 1869, as evidence of the revocation of that of 1865, which was the subject-matter of the issue.

Judgment reversed, and venire facias de novo awarded.

STATE BANK, plaintiff in error, v. McCoy.

(60 Penn. St. 204.)

Promissory note — drunkenness of maker.

The drunkenness of the maker of a negotiable promissory note cannot be set up as a defense against an innocent holder for value. The indorsee will be deemed an innocent holder unless he took the note *mala fide*, and with notice of the condition of the maker. (*See note*, p. 251.)

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ACTION on a promissory note brought by the State Bank, indorsee, against Neal McCoy, maker. The note was made while defendant was intoxicated, and was payable to J. J. Wilhelm & Co. or bearer. The opinion sufficiently states the case. The verdict was for defendant. Plaintiff took out a writ of error.

B. F. Junkin (with whom was *J. Lyons*), for plaintiff in error, cited *Phelan v. Moss*, 67 Penn. St. 59.

J. Alexander, for the defendant in error. Drunkenness is a defense to a contract. Story on Cont., §§ 27, 28, and cases cited. *Pitt v. Smith*, 3 Campb. 33; Pothier on Obligations, Part 1, art. 4, § 49. Notice may be inferred from circumstances sufficiently strong to cast a shade on the transaction, and put the holder on inquiry. Story on Notes, § 198; *Commonwealth v. Baldwin*, 12 Pick. 151; id. 545.

WILLIAMS, J. This was an action brought by the State Bank, as indorsee, against the defendant as maker of the promissory note sued on, and the defense was that it had been fraudulently obtained from the defendant when he was drunk, and that the bank took it under such circumstances of suspicion that it was not a *bona fide* holder for value, without notice of the fraud. Under the charge of the court, the jury found that the defendant received no consideration for the note; that he was so intoxicated at the time he signed it, as to be wholly unconscious of what he was doing; and that the bank was guilty of gross negligence in taking it. Waiving for the present the question as to the sufficiency of the evidence to justify the jury in finding that the bank was guilty of gross negligence in taking the note, the first matter to be considered is, whether the intoxication of the defendant, at the time he signed it, is a valid defense to the action, if the bank is a *bona fide* holder of the note for value, without notice of the fraudulent circumstances under which it was obtained. Undoubtedly, the total drunkenness of the maker when he executed the note, if known to the payee, rendered it void as to the latter. *Gore v. Gibson*, 13 M. & W. 623. The old rule that a man should be held liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, has been long since exploded, and

it is now settled, according to the dictate of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is void as between the parties. 2 Kent's Com. 452. As was said by PARKE, B., in *Gore v. Gibson*: "Where the party, when he enters into the contract, is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void, and he cannot be compelled to perform it." But if the drunkenness of the maker, when known to the payee and taken advantage of by him, or when so complete as to suspend the use of the reason and understanding, renders the note void in the hands of the payee, the question recurs whether it avoids it in the hands of an indorsee for value, without notice of the maker's condition when he gave the note, and of the fraudulent circumstances under which it was obtained? There is no case which so decides. But it is contended that drunkenness is a species of insanity, and, therefore, a contract made by one, when in such a state of drunkenness as not to know what he was doing, should, like the contract of an insane person, be regarded as absolutely void. But the contract of an insane man is not, under all circumstances, an absolute nullity. As was said in *La Rue v. Gilkyson*, 4 Barr, 375, an insane man, like an infant, is liable on his executed contract for necessities; and it was more than intimated in *Beals v. See*, 10 Barr, 56, that he would be liable for merchandise innocently furnished to his order by a person unapprised of his infirmity. But if, as ruled by Lord TENTERDEN, C. J., at Nisi Prius, in *Sentance v. Poole*, 3 C. & P. 1 (14 Eng. Com. Law, 419), the note of an insane person, or of one perfectly imbecile, which he has been induced to sign by fraud and imposition, is void in the hands of an innocent indorsee; it does not follow that a note given by a person in a state of intoxication is void in the hands of a holder for value, without notice of the maker's condition when it was given. There is this difference between the cases. Insanity or total imbecility is a permanent state or condition of the mind, disabling one from taking care of himself. Drunkenness is a temporary disability, voluntarily produced. Insanity is a misfortune—drunkenness is a vice. No man voluntarily does an act necessarily producing madness in order that he may become insane. But men drink in order that they may get

drunk. And when they thus temporarily deprive themselves of the use of their reason, and voluntarily expose themselves to fraud and imposition, the law may wisely refuse to treat them with the same tenderness that it does those unfortunate beings who are deprived of their understanding, by some providential dispensation; and it may properly hold them to a different measure of responsibility for the consequences of their acts. If a man voluntarily deprives himself of the use of his reason by strong drink, why should he not be responsible to an innocent party for the acts which he performs when in that condition? It seems to me that he ought, on the principle that where a loss must be borne, by one of two innocent persons, it shall be borne by him who occasioned it. As between the contracting parties, where one of them is so drunk as not to know what he is doing, the contract is doubtless void, especially if the other is apprised of his condition, and, if not willfully or culpably blind, he must know it. As was said by PARKE, B., in the case already quoted: "A person who takes an obligation from another under such circumstances is guilty of actual fraud." But if there is nothing to give notice of the intoxication, or to put one upon inquiry, as where a contract is made by letter or message sent by post or telegraph, and is executed in good faith by the party receiving the order, if the other party should refuse to perform the contract on the ground that he was totally drunk when he sent the order or entered into the contract, it is clear that, on the principle already stated, the defense ought not to avail. Why, then, should the maker of a note be allowed to set up against an innocent holder the defense of drunkenness? But there is another and controlling reason for holding the maker liable to the indorsee in such case, founded on principles of public policy and the necessities of commerce. The exigencies of trade require that there should be no unnecessary impediments to the ready circulation and currency of negotiable paper, but that it should be left free to pass from hand to hand like bank notes, and perform the functions of money, untrammelled by any equities or defenses between the original parties. If then, it should be held that the drunkenness of the maker avoids his note in the hands of the indorsee, it is obvious that such a rule would greatly clog and embarrass the circulation of commercial paper, for no man could safely take it without ascertaining the condition of the maker or drawer when it was given, although there might be nothing suspicious in its appearance or unusual in

the character of the signature. It is evident that it would be a less evil to exclude the defense of drunkenness, though it might occasionally work individual hardship, than to clog the circulation of commercial paper, to the great inconvenience of the public, by admitting such a defense. If fraud and imposition in obtaining a note will not avoid it in the hands of an innocent indorsee — because such a rule would render commercial paper less valuable and convenient as a medium of exchange — why should the drunkenness of the maker? Why should drunkenness be a defense if there has been no fraud or imposition? And if there has, and this is the ground of the defense, why should it not avoid the note in the one case as well as in the other? If, then, drunkenness is no defense as against the indorsee, without notice of the maker's condition, was the bank guilty of gross negligence in taking the note, under the circumstances, without inquiry of the maker? There was nothing suspicious in the appearance of the note, or in the character of the signature, nothing to indicate that it was the note of a drunken man. So far as appears from the evidence, the signature was the usual and ordinary one of the maker. If it had the appearance of being written by a drunken man, the bank might have been put upon inquiry. The fact that the bank was informed that the note was given for a patent hay-fork, and purchased it, with other notes, amounting in the aggregate to about \$3,000, for fifty cents on the dollar, and took from the payees a guaranty that it should realize that amount out of the notes, was no evidence that the bank was guilty of gross negligence in taking the note without inquiry. But if the evidence had made out a case of gross negligence on the part of the bank, that alone would not have been sufficient to defeat its title to the note. As shown by Mr. Justice READ, in *Phelan v. Moss*, 67 Penn. St. 59 (5 Am. R. 402), there must have been proof that the bank took the note *mala fide* or with notice of the fraud. As there was no such evidence, the court erred in not affirming the plaintiff's second, third and fifth points.

The question whether it was lawful for the bank to purchase the notes at so great a rate of discount, and if not, whether there can be a recovery on the note in suit, does not arise on this writ of error, and, therefore, we express no opinion upon it. Where the verdict is for the defendant no question of law can be properly reserved, for no judgment can be entered in favor of the plaintiff's *non obstante veredicto* in case of a decision in his favor. *Robinson*

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v. *Myers*, 67 Penn. St. 9. We must, therefore, reverse the judgment, and remit the record to the court below for a new trial.

Judgment reversed, and a venire facias de novo awarded.

NOTE. — *Caulkins v. Fry*, 85 Conn. 170, was an action by a *bona fide* holder against the maker of a promissory note. The defense was set up that defendant was drunk when he made the note. It was held that "complete drunkenness" not being proved, the defense must fail. *Arguendo* the court said that "complete incapacity of the maker," which shows that the paper is void, is a good defense as against a *bona fide* holder.

In the recent case of *Matthews v. Baxter*, 28 L. T. R. (N. S.) 169; L. R., 8 Ex. 132 (1873), the court of exchequer held that the contract of a man, too drunk to know what he is about, is voidable only and not void, and therefore capable of ratification by him when he becomes sober. *Gore v. Gibson*, cited in the principal case, was held to be authority only for the proposition that a contract made by a drunken man cannot be enforced *in tortum* against him. *Molton v. Camroux*, 13 M. & W. 623, is to the same effect as *Matthews v. Baxter*. See further on this subject, 1 Parsons on Notes and Bills, 275; 1 Parsons on Contracts, 383, and 1 Story's Eq. Jur., §§ 231-233.

The doctrine of this case, that gross negligence on the part of the bank was not enough to vitiate its title to the note, is in accordance with the authorities. See note, 5 Am. R. 266. But is in direct conflict with the decision of the supreme court of Vermont in *Gould v. Stevens*, 5 Am. R. 266. — REP.

FLOWER AND WIFE, plaintiffs in error, v. THE PENNSYLVANIA
R. R. Co.

(69 Penn St. 210.)

Master and servant — liability of master to servant. Infant.

At a station where defendants' train of cars had stopped, the engine, tender, and one car ran down to the water-tank in charge of the fireman, who asked a boy ten years old, standing there, to put in the hose and turn on the water. While the boy was climbing upon the tender to comply with the request, some detached cars belonging to the train came down with ordinary force, and struck the car next to the tender, whereby the boy was thrown down and crushed to death. In an action by the parents of the boy, *held*, that the defendants were not liable.

ACTION by John M. Flower and wife against the Pennsylvania Railroad Company, to recover damages for the death of plaintiffs' son, a child ten years old, alleged to be occasioned by the negligence of defendants' servants. The opinion states the facts. The verdict was for defendants. Plaintiffs took out a writ of error.

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A. C. Reinohl and O. J. Dickey, for plaintiffs in error, cited 1 Redf. on Railw. 512, 513, pl. 6-9.

H. M. North and L. W. Hall (with whom was *G. F. Breneman*), for defendants in error. The deceased being where he had no right to be, the plaintiffs cannot recover. *Philadelphia and Reading Railroad v. Hummel*, 8 Wright, 375; *Same v. Spearen*, 11 id. 300; *Gillis v. Pennsylvania Railroad*, 59 Penn. St. 129. The employer is not responsible for his servant's acts, not in the scope of his employment. *Potter v. Faulkner*, 1 Best & Smith, 800; *Lygo v. Newbold*, 9 Exch. (W. H. & G.) 302; *Wilson v. Peverly*, 2 N. H. 548; *Thames Steamboat Co. v. Housatonic Railroad*, 24 Conn. 40; *Satterlee v. Groat*, 1 Wend. 272; *Goodman v. Kennell*, 3 Car. & P. 167. If properly called to assist, the deceased was in the condition of a fellow-servant, and the defendants would not be liable for the other servant's negligence. Shear. & Redf. on Neg. 122.

AGNEW, J. It is proper this case should be examined in the light of the evidence of the plaintiffs. According to that view, the engine, tender and one freight car ran down to the water-tank to take in water. They were in charge of the fireman, the engineer having necessarily stopped off till their return. At the water station, the fireman in charge asked the son of the plaintiffs, a boy ten and a half years old, standing on the platform of the water-tank, to put in the hose and turn on the water, and then turned to clean out the ash-pan of the engine. The boy climbed up the side of the tender to put in the hose, and, as he did, some detached freight cars belonging to the train came down without a brakeman, and struck the car behind the tender, driving the tender and engine forward from six to ten feet. The boy fell from the tender and was crushed to death. Is the railroad company responsible to the parents? The case involves no public right. The accident happened at no crossing, or place where the public had a right to be. The boy was not a passenger, or one to whom the company owed a special duty. The platform of the water-tank was the private property of the company, and was used for its own purposes. The engine and tender were where they had a right to be. The track itself was the property of the company, and the detached cars were not the cause of injury, in any sense, which affected the public rights or even those of the employees of the company. They came against the car and

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tender with no great force, and did no injury to the property or employees of the company. They were the cause of injury to the boy, only in so much that he had placed himself in a position of danger, where ordinarily he had no right to be. It is evident, therefore, that the case turns wholly on the effect of the request of the fireman, who was temporary engineer, to put in the hose and turn on the water. Did that request involve the company in the consequences? This is a very hard case. A willing, bright boy, not arrived at years of discretion, has lost his life in simply trying to oblige the fireman. But we must not suffer our sympathies to do injustice to others, by overriding those fixed principles which underlie the rights of all men, and are essential to justice. It is natural justice that one man should not be held liable for the act of another, without his participation, his privity or his authority. It is clear that the fireman, through his indolence or haste, was the cause of the boy's loss of life. Unless his act can be legally attributable to the company, it is equally clear the company was not the cause of the injury. The maxim, *qui facit per alium facit per se*, can apply only where there is an authority, either general or special. It is not pretended there was a special authority. Was there a general authority which would comprehend the fireman's request to the boy to fill the engine tank with water? This seems to be equally plain, without resorting to the evidence given, that engineers are not permitted to receive any one on the engine but the conductor and the foreman or superintendent; that it is the duty of the fireman to supply the engine with water; that he has no power to invite others to do it, and can leave his post only on a necessity. The business of an engineer requires skill and constant attention and watchfulness; and that of a fireman requires some skill and much attention. They are in charge of a machine of vast power, and large capacity for mischief. The responsibility resting on them, and especially on the engineer, is great, and neither should be permitted to delegate the performance of his duties to others. In doing so without permission they transcend their powers. There cannot, therefore, be any general authority in the engineer and fireman which can embrace a request to perform the fireman's duty. Even an adult, to whom no injury would be likely to ensue, could not justify under the fireman's request. Much less can there be any presumption of authority to invite a boy of tender years to perform a service which required him to clamber up the side of the engine or tender. It was a wrong on

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part of the fireman to ask such a youth to do it. Whether the boy could be treated as a mere trespasser is scarcely the question. His youth might possibly excuse concurrent negligence where there is clear negligence on part of the company. Such were the cases of *Lynch v. Nurdin*, 1 A. & E. N. S. 29 (41 E. C. L. 422); *Rauch v. Loyd & Hill*, 7 Casey, 358; *Smith v. O'Connor*, 12 Wright, 218. See, also, *Railroad Co. v. Spearen*, 11 id. 300, *Oakland Railroad Co. v. Fielding*, 12 id. 320. The true point of this case is, that in climbing the side of the tender or engine, at the request of the fireman, to perform the fireman's duty, the son of the plaintiffs did not come within the protection of the company. To recover, the company must have come under a duty to him, which made his protection necessary. Viewing him as an employee, at the request of the fireman, the relation itself would destroy his right of action. *Caldwell v. Brown*, 53 Penn. St. 453; *Weger v. Pennsylvania Railroad Co.*, 55 id. 460; *C. V. Railroad Co. v. Myers*, id. 288. Had the fireman, himself, fallen in place of the boy, he could have had no remedy. It does not seem to be reasonable that his request to the boy to take his place, without any authority, general or special, can elevate the boy to a higher position than his own, and create a liability where none would attach had he performed the service himself. It is not like the case of one injured while on board a train by the sufferance of the conductor, whose general authority extends to receiving and discharging persons to and from the train. *Pennsylvania Railroad v. Books*, 57 Penn. St. 339. It is not like those cases where an injury happened to boys crawling under the cars to get through a train occupying a public street, which they had a right to cross. *Rauch v. Loyd & Hill*; *Pennsylvania Railroad Co. v. Kelly*, 7 Casey, 358, 372. Nor does it resemble the case of *Kay v. Pennsylvania Railroad Co.*, 65 Penn. St. 269 (3 Am. R. 628), decided at Philadelphia last year, where detached cars were sent around a curve, without a brakesman in charge, upon a track which the public had been in the habit of traveling over constantly for a long time with the knowledge of the company, from one part of the city of Williamsport to another. Here the boy was voluntarily where he had no right to be, and where he had no right to claim protection; where the company was in the use of its private ground, and was not abusing its privileges or trespassing on the rights or immunities of the public. The only apology, for his presence there, is the unauthorized request of one who could not delegate his duty,

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and had no excuse for visiting his principal with his own thoughtless and foolish act. Nor can the mere youth of the boy change the relations of the case. That might excuse him from concurring negligence, but cannot supply the place of negligence on part of the company, or confer an authority on one who has none. It may excite our sympathy, but cannot create rights or duties which have no other foundation.

Upon the whole case, finding no error in the record, the judgment is

Affirmed.

WASHINGTON AVENUE.

(60 Penn. St. 352.)

Constitutional law — assessments for improving highways.

The legislature has no authority to compel the owners of farm lands, lying within one mile on each side of a public highway, to pay for grading macadamizing and improving it, by an assessment upon their lands by the acre.

BILL for an injunction against the commissioners of Washington avenue, restraining them from collecting a tax under an act of the legislature. The opinion states the facts. The injunction was granted. The commissioners appealed.

C. S. Tetterman, for appellants.

M. W. Acheson (with whom was *N. W. Shafer*), for appellees.

AGNEW, J. This case presents a new question upon the power of taxation — the authority of the legislature to compel the owners of farm lands, lying within one mile on each side of a public highway, to pay for grading, macadamizing and improving it, by an assessment upon their lands by the acre. It is not a case of municipal taxation by a county, township, city or borough, for local improvements. The law created a corporation of seven commissioners to take charge of the avenue, make the improvements, lay and collect the taxes, and provide for the collection of tolls for its use. The

road has no respect to township authorities, township lines, or the mode of levying township taxes. It is not the case of taxation by frontage, for the lands of the plaintiffs in the bill do not abut upon the avenue, but merely lie within the prescribed lines of taxation. It is not a case of local improvement, and taxation therefor, upon those exclusively, or even those peculiarly benefited; for the master finds that some of the plaintiffs do not use the avenue, but travel on parallel roads; that persons two miles outside, and on each side of the lines of taxation, are nearly, or quite, as much benefited as those within these lines, and that owners of property and the public, far beyond the southern terminus of the avenue, in the direction of Canonsburg and Washington, are greatly benefited. In short, he finds that the proposed improvement will be a *general public benefit*.

Washington avenue is but seven miles long, passing through six townships and part of a seventh; but if this mode of taxation, to grade, macadamize and improve it, can be maintained, the legislature, on the same principle, can make a turnpike, a canal, a railroad, or any other highway across the State, and compel the owners of lands within one, or any fixed number of miles, to pay for it, and can assess the cost per acre, not only at \$6, \$4 and \$3 per acre, as in this law, but at sixty, forty, thirty or any number of dollars, necessary to build the highway. If this be legitimate taxation, it has no bounds, for it must be conceded that the power of taxation, properly so called, has no limit in the constitution, and is bounded only by the necessities of the State or the will of the people.

The practice of municipal taxation by counties, townships, cities and boroughs for local objects had its origin in necessity and convenience. Hence roads, bridges, culverts, sewers, pavements, school-houses, and like local improvements, are best made through the municipal divisions of the State, and paid for by local taxation. These have always been supported as proper exercises of the taxing power. Nor is this mode of taxation inconsistent with our notions of the right of private property and of the equality of burdens; for each municipality in its turn, sooner or later, by a tax on all its inhabitants, pays only for what it makes and enjoys within its own limits, and thus, in the course of time, the burden is equalized upon all, as every portion of the State makes its own improvements and enjoys their peculiar benefits. This practice was followed by another advance in the local mode of taxation. In cities and towns where population was dense, the authorities began to make improve-

ments of special advantage to certain of the citizens at their expense; such as footwalks in the front of dwellings, and pavements in those streets which were well built up, and where good carriage-ways were needed. Here, too, though a step far in advance of the system of general taxation, our notions of private right were not violated, for the advantages to the owners were so clear in the promotion of their convenience, and the enhanced value of their lots, caused by improved footwalks and carriage-ways, that the burden was compensated, and again equality was produced as each street or alley came to be paved. So far, public opinion and ancient and long-continued legislative practice have sustained local taxation with great unanimity, and this is strong evidence of the true interpretation of the constitutional power of the legislature to authorize municipal taxation of this sort. Indeed, the general acquiescence of the people in this exercise of the power is so clear, that few cases are to be found in the books, wherein any question has been made upon the power itself.

In two cases, coming under my notice, it was said that a municipal assessment, upon property subjected to payment for local improvements, is not a tax. *Pray v. Northern Liberties*, 7 Casey, 69; *The Borough of Greensburg v. Young*, 53 Penn. St. 280. Technically, the statement is true, when we speak of a tax as ordinary revenue; but it is clear that in neither case it was meant to say, that such an assessment is not taxation within the general legislative power to tax, but only that it was not a tax within the acts of assembly requiring certain things to be done prescribed in the case of ordinary taxation for revenue. Had it been meant to say that such an assessment is not taxation at all, it would, in effect, deny the power of the legislature to authorize the assessment, a power which was affirmed in both of these cases.

In order to take the money or effects of the citizen and apply them to public uses, besides the power of taxation, I know none other than that of eminent domain. But such an assessment does not fall within the latter, for eminent domain acts only by a direct taking of the property for a public use, and by way of a compensation for the taking, in obedience to a constitutional injunction forbidding the property of the citizen to be otherwise taken. The power of taxation and eminent domain have always been clearly distinguished.

Next came another step forward, in the exercise of the power of

local taxation, but one more doubtful, and, at first view, not so easily perceived to be within the legislative power; that is to say, the assessment of the property of one man to pay the compensation due to another whose property has been taken for a public use. Here the right to assess seems to be further removed from the true source of the power, and it is more difficult to discern the liability of the few to pay, what the State herself seemingly should pay by general taxation, for property taken under the power of eminent domain.

In consequence of this doubt, the question was presented to this court in the case of *McMasters v. The Commonwealth*, 3 Watts, 292. There the property of Nancy Knox and others was taken for the purpose of making a new street from the Diamond to Fifth street, in the city of Pittsburg, and their compensation ascertained by a jury of freeholders.

The McMasters' lot was then assessed with a part of the compensation in proportion to the benefits found by the jury to be conferred upon the lot by the opening of the adjoining new street. The eminent counsel of McMasters, the late Judge FORWARD, seems to have considered the assessment of his property as an exercise of the power of eminent domain, and denied its validity upon the ground that the act proposed to take his property, or, at least, his money, and to compensate him in benefits. This he contended the legislature could not do, but must compensate him in money, citing *Vanhorne v. Dorrance*, 2 Dall. 315, on this point.

Justice ROGERS, however, denying the authority of *Vanhorne v. Dorrance*, held that compensation under the constitution need not necessarily be in money, but may be in whole or in part by actual benefits conferred; instancing the numberless turnpike and canal laws (to which railroad acts may be added), in which the viewers, in estimating damages, are required to take into consideration the advantages accruing to the land-owner. And, when he comes to consider the question as to the assessment on McMasters' lot, he admits that it is a new feature in our legislation, yet thinks the principle not new, citing *Livingstone v. The Mayor of New York*, 8 Wend. 85. But what the precise principle is, he does not very distinctly define, though in the main he seems to derive it from the power of local taxation for benefits received. It appears to me, when closely examined, this is its only true source. It is simply a new development of that principle of local taxation before mentioned as undisputed, which assesses on the property benefited or its owner a tax, in

proportion to the superadded value of the property, caused by the local improvement of which this property has a peculiar advantage beyond that of others not in like circumstances. For if we analyze the transaction, we shall find that the compensation paid to Mrs. Knox and others for their property taken to make the new street, is a thing wholly distinct from, and independent of, the money paid by McMasters. The assessment upon him is not simply by way of taking his money to pay them, but was by way of an assessment upon him for the benefits he received from the improvement. His money, it is true, passes directly into their compensation, but this is merely to avoid circuitry of payment, by an immediate appropriation of his tax. In principle, therefore, it is an independent transaction, and is the same thing as the money paid by an abutting lot-owner for the pavement before his door, into the public treasury, and thence paid out to the paver of the street. Yet in that case what difference would it make were the money of the abutting lot-owner appropriated directly to pay the paver, provided his assessment be made on the principle of his paying according to his proportional benefit? Indeed, this is nearly the present system of paving streets in Philadelphia. The exercise of this power of assessments for benefits, as before remarked, is not by way of eminent domain, in the usual sense of this term, for it is not a taking at all, followed by compensation for the taking; but it is a special mode of taxation, which equalizes burdens, by a counter-balance of benefits, whereby those benefited more pay more, and those benefited less pay less. It is thus special as contradistinguished from general taxation, but not special as making one man to pay all or more than his just proportion of a common burden. General taxation pays no regard to equality of burden, further than to lay the tax in proportion to the amount of the assessable property of each tax payer, throwing out of view all questions of special benefit. So long, therefore, as the benefits of each tax payer are justly and impartially assessed under the special system, I cannot see that the general system is more just or impartial. Indeed, if faithfully executed, the special system seems to be more equal and just, for, under the special system, some may be greatly benefited more than others, and yet, pay but a small proportion of the tax, considering what they receive. For example, a poor man may send many children to school, while a man of large property, having none to send, may pay a large tax; and a man

being greatly benefited by a public road, may pay a very small proportion of the tax which keeps it up.

Taxation, according to benefits received, is neither unequal nor unjust, and cannot, therefore, come into conflict with those clauses in the bill of rights, which regard as sacred the right of private property. So long, therefore, as a law faithfully and reasonably provides for a just assessment according to the benefits conferred, and does not impose unfair and unequal burdens, it cannot be said to exceed the legislative power of taxation, when exercised for proper objects. It is on this ground only that assessment, according to the frontage of property on a public street to pay for its opening, grading and paving, is to be justified. As a practical result, in cities and large towns, the per foot front mode of assessment reaches a just and equal apportionment in most cases. Hence, this mode has been deemed a reasonable exercise of the taxing power in such places, with a view to taxation according to the benefits received. Whatever doubt might have been originally entertained of it as a substitute, which it really is, for actual assessment by jurors or assessors under oath, it has been so often sanctioned by decision, it would ill become us now to unsettle its foundation by disputing its principle. But it is an admitted substitute, only because practically it arrives, as nearly as human judgment can ordinarily reach, at a reasonable and just apportionment of the benefits on the abutting properties. Hence, the fairness of the rule of charging benefits by frontage was a conceded point, in *Hammitt v. The City of Philadelphia*, 65 Penn. St. 155 (3 Am. R. 615). But this rule, as a practical adjustment of proportional benefits, can apply only to cities and large towns, when the density of population along the street, and the small size of lots, make it a reasonably certain mode of arriving at a true result.

To apply it to the country and to farm lands would lead to such inequality and injustice as to deprive it of all soundness as a rule, or as a substitute, for a fair and impartial valuation of benefits in pursuance of law; so that, at the very first blush, every one would pronounce it to be palpably unreasonable and unjust. Judged of by this rule for deciding in a question of constitutional power, the law in this case cannot stand.

Whether we view this avenue as a macadamized highway, seven miles long, or three hundred, the result is the same to those along its route. To charge its cost upon the farms lying within one mile

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on each side, at a fixed sum per acre, is so obviously onerous and unreasonable, and leads to such a destruction of private right, and such unfairness of imposition for the advantage of the public at large, and of individuals who pay nothing, it cannot, on any fair principle of reasoning, be said to be a valuation according to benefits. In other words, it cannot with any degree of truth be pronounced to be a proper substitute for a just and impartial valuation of benefits. This needs no reasoning to make it plainer than the proposition presents itself to the mind the moment it is stated. If unreasonable and not a fair substitute for a valuation made by a disinterested tribunal, acting according to the law of the land, then it plainly is not within the principle of the many decisions, in this and other States, recognizing the per foot frontage rule as a fair mode of measuring the benefits, and is consequently not a legitimate method of assessment upon the adjacent farm lands. I admit that, if we do not analyze the reason and trace the origin of the frontage rule, there is a seeming analogy between the Washington avenue act and many preceding it for the improvement of streets in cities and towns.

But reasoning by analogy is sometimes a dangerous source of error, and is always so, if we fail to see that the analogy itself is accurate. In the present case, an examination of the facts, in which the per foot frontage rule is based, discloses at once the want of analogy between large farms with single occupants or owners, or wild or untenanted land, in the country, and the small lots of a crowded street in a populous town. The legislature, therefore, made a mistake in fixing such a burden upon the lands along the route of this avenue. It is in fact nothing more than a law to coerce certain land-owners to pay for a public improvement in which their interest is no greater, and as to some of them not so great, as that of many others who pay nothing; and it offends against the clear intent and spirit of the bill of rights. There is no case in our books wherein the legislative power to tax has been maintained with greater vigor and ability than in *Sharpless v. The City of Philadelphia*, 9 Harr. 147; yet, even there, the then chief justice admits (p. 166) that the exercise of the power may be forbidden by clear implication, as well as express restriction. "It is not every act the legislature may choose to call a tax law that is constitutional." "The whole public burden," he contends, "cannot be thrown upon a single individual, under pretense of taxing him." This is a concession that taxation has a limit *per se*,

and is not always co-extensive with legislative exaction. When, therefore, the constitution declares, in the ninth article, that among the *inherent* and *indefeasible* rights of men is that of acquiring, possessing and protecting property — that the people shall be secure in their *possessions* from *unreasonable* seizures — that no one can be *deprived* of his *property* unless by the judgment of his peers, or the law of the land — that no man's *property* shall be taken or *applied* to public use without *just compensation* being made — that every man for an injury to his *lands or goods* shall have remedy by *due course of law*, and *right* and justice administered without sale, denial or delay — and that no law impairing contracts shall be made — and when the people, to guard against transgressions of the high powers delegated by them, declared that these rights are excepted out of the general powers of government, and shall forever remain inviolate, they, for their own safety, stamped upon the right of private property an inviolability which cannot be frittered away by verbal criticism on each separate clause, nor the united fagot broken, stick by stick, until all its strength is gone.

There is a clear implication from the primary declaration of the inherent and indefeasible right of property, followed by the clauses guarding it against specific transgressions, that covers it with an ægis of protection against all unjust, unreasonable and palpably unequal exactions under any name or pretext. Nor is this sanctity incompatible with the taxing power, or that of eminent domain, where, for the good of the whole people, burdens may be imposed or property taken.

I admit that the power to tax is unbounded by any express limit in the constitution — that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further than all derive benefit from the purpose to which it is applied. But, nevertheless, taxation is bounded in its exercise by its own nature, essential characteristics and purpose. It must, therefore, visit all alike in a reasonably practicable way, of which the legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation,

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extortion, not assessment, and falls within the clearly implied restriction in the bill of rights.

It is found by the master, and, if it had not been found by him, it is perfectly obvious that this avenue will be one of general public benefit; and specially that it will be of great convenience and individual benefit to citizens and tax payers, beyond the limit of taxation along the road, both laterally and terminally.

Indeed, beyond its southern terminus its benefits reach a considerable distance into the county of Washington. This brings it within the principle of *Hammett v. The City of Philadelphia*, *supra*, expressed in these words, at the conclusion of the opinion of our brother SHARSWOOD: "Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of these benefits. They cannot be imposed when the improvement is either expressed, or appears to be, for general benefit." I concurred in that opinion, and I see no reason to regret my concurrence; but, on the contrary, I see in the present case much to confirm it; and the examination I have just made into the power of special taxation, it seems to me, tends to confirm and strengthen what was so well reasoned in *Hammett v. The City*. Indeed, I consider it a fortunate circumstance that that case came up, for it led to an inquiry into the power of special taxation, which was in danger of running wild by insensible degrees, and leading, before we had become aware of it, into the exercise of a bastard power, dangerous to the right of private property, and violative of the provisions in the bill of rights, placed there for its protection. In questions of power exercised by agents, it is sometimes the misfortune of communities to be carried, step by step, into the exercise of illegitimate powers without perceiving the progression, until the usurpations become so firmly fixed by precedents, it seems to be impossible to recede or to break through them." The majority opinion in that case did not then, and this opinion does not now, dispute the long recognized power of local taxation for local improvements, according to the benefits conferred; but they meet and dispute departures from that power, which, if recognized, will land in the overthrow of the right of private property. Laws which cast the burdens of the public on a few individuals, no matter what the pretense, or how seeming their analogy to constitutional enactments are, in their essence, despotic and tyrannical, and it becomes the judiciary to

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stand firmly by the fundamental law, in defense of those general, great and essential principles of liberty and free government, for the establishment and perpetuation of which the constitution itself was ordained. Should we now suffer this law to pass without judicial criticism and condemnation upon a false analogy of the frontage rule in cities and large towns, we should leave open a door for future impositions upon private property, so wide and spacious, errors the most odious and of enormous proportions would enter in.

For these reasons, the decree below is affirmed.

McMASTERS, plaintiff in error, v. **PENNSYLVANIA R. R. Co.**

(69 Penn. St. 374.)

Common carrier — effect of custom on termination of liability.

Custom or usage will control the general law of liability of common carriers. Defendants, a railroad company, delivered a barrel of sugar at a way station where they had no warehouse, but gave no notice to plaintiff, the consignee. It was proved that it was the custom for consignees, at that station, to be present to receive goods directed to them. *Held*, that a delivery on the plat form was a good delivery under the custom.

ACTION against a railroad company to recover for the loss of a barrel of sugar consigned to plaintiff. The case involves the effect of custom on the termination of a common carrier's liability, and the opinion sufficiently states the facts to which the principles laid down are applied. The verdict was for defendants. Plaintiff took out a writ of error.

R. E. Stewart, for plaintiff in error.

J. Dalsell (with whom was *J. H. Hampton*), for defendants in error.

THOMPSON, C. J. The important question of this case is, whether the common liability of common carriers, in its application to carriers by rail, has been, or is, subject to be modified by usage or custom. That it has been materially modified in its application to

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the mode of carrying from what it was and is, under the old modes of transit by wagons or by water-craft, every one knows. By the former, the carrier's liability only ceased with a delivery of the goods to the person, or at the residence or place of business of the consignee; and, by the latter, on giving notice of their arrival at the usual place of delivery to the consignee, and care of the goods for a reasonable time to enable him to take them away. Custom has modified this, as is shown in 2 Redf. on Railways, 51, 52; 5 Dutch. (1 N. J.) 393; 60 Penn. St. 109; manifestly because of the inapplicability of the old system to the new mode of transit. Every day the old rule is being gradually modified by contract, usage or notice, to fit it to the new order of business in that line. Indeed, the whole system of the law of common carriers grew out of customs molded into form and made practical by the courts in England, and hence for a long time, when suits were brought against persons engaged in the carriage of goods and merchandise, the action was called an action upon the custom of the realm. In modern times, the practice is to sue upon the contract. It would be strange if the process of improvement by custom and usage is to stop just here and go no further. I regard it as a matter not debatable at this day, that a custom so long persisted in as to be known and practiced by a community shall not become the law of the particular business in which it exists in the community, from which the presumption will arise that it is in the view of the parties who contract about the subject-matter of it, and depend that it will be the interpreter of their contracts whenever they leave room for a resort to it. In other words, where the express terms of the contracts do not exclude it, usages of this kind in trade, which have a like effect when clearly established, are generally found in practice to exhibit a superior adaptedness to the convenience and wants of the community to those which are superseded by them, and in this way development and progress results. It is hardly necessary to say that all usages that become customs must be reasonable, for it is not likely in modern times that any thing else would be suffered to grow into a custom, nor that it must be continued, for otherwise it would never become a custom; still, both these elements are requisites, and also that they be peaceably acquiesced in by all acting within the scope of their operations. Let us now, therefore, endeavor to apply these generalizations to the case in hand, so far as they are applicable to it.

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On the 8th of August, 1868, the plaintiff bought a barrel of sugar at the city of Pittsburg, and directed his merchants to ship it to him at Turtle Creek, a way-station on the defendants' road, some dozen or fourteen miles from the city, the next day. They did so, and paid freight; but the plaintiff never got the sugar, although he sent for it; but, from the evidence, most likely not on the day it was shipped, but on the second day. It became a question, therefore, on the trial, whether the defendants' servants actually delivered the sugar on the platform of that station on the day it should have arrived there. The verdict of the jury was a finding that it was so delivered as stated by defendants' witnesses.

The defendants had no warehouse at that place, and gave no notice to the consignee that the sugar had been delivered at that place, but insisted that it was the custom for consignees to be present themselves, or by somebody for them, to receive goods shipped for them by rail to that place. This custom was testified to by the plaintiff himself, and also by the conductor of the local freight train, and the proof was not at all controverted. Was this uncontroverted custom sufficient excuse for the want of warehousing, and of notice to the consignee by defendants? The learned judge thought it was, and so instructed the jury, and there was a verdict for the defendants. In other words, he held a delivery on the platform a good delivery under the custom.

That a custom or usage will control the general law of liability of carriers is shown by many cases. I will quote briefly from a few of the decisions to that effect, as also from some of our most reliable text-writers. Among the clearest and strongest of the decisions on the point is, *The Farmers and Mechanics' Bank v. The Champlain Transportation Co.*, 23 Vt. 186. The question arose on the sufficiency of the delivery of a package of money carried by the transportation company for the bank. The case was before the supreme court of Vermont *three* times, and that court, says PARSONS, in his note to it, "has uniformly held that, in the absence of any special contract, a delivery to the wharfinger, without notice, if warranted by the usage of the place, was sufficient, and discharged the defendants from all liability." Judge REDFIELD appends this as a note to section 2, p. 51, 2d volume of his work on Railways, where he says: "That transportation being confined to a given line, according to the ordinary and reasonable course of business, goods must be delivered and received at the stations of the company." Angell

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on Carriers, § 316 (3d ed.), lays it down thus: "But the carrier may be permitted to prove that the uniform usage and course of business in which he is engaged is, to leave goods at his usual stopping-places in the town to which they are directed, without notice, and if such usage has been so long continued as to justify a jury to find that it was *known to the employer* the carrier will be discharged." The text of this placitum is supported to the letter, almost, by the case of *Gibson v. Culver*, 17 Wend. 305. In that case also, there are two English cases cited, which give very clear countenance to the doctrine announced, namely, *Garside v. The Proprietors of the Trent and Mersey Nav. Co.*, 4 T. R. 581, in which it was held that the usage and course of business were properly received to determine whether the defendants, at the time when the goods were lost, held them as common carriers, or were wharfingers for the plaintiffs. The proof was confined, too, to the course of business of that particular line of stages, and on this ground the cause was determined in favor of the defendants. The other case is *Hyde v. Same*, 5 T. R. 389, and it was agreed by the judges that carriers by canal must, by the general law, make a personal delivery to the consignee, but that this obligation might be affected by the custom of the trade. This is very clearly shown in *Van Santvoord v. St. John & Toucey*, 6 Hill, 157, where the same doctrine is clearly maintained. Our own case of *Cope v. Cordova*, 1 Rawle, 203, is full to the same effect. ROGERS, J., in delivering the opinion of the court, among other things, said: "If a special verdict had found a uniform usage the one way or the other, we should have held ourselves bound by the custom; for I fully accede to the principle, *that the mode of delivery is regulated by the practice of the place*. The contract is supposed to be made in reference to the usage at the port of delivery. But if no usage had been found, we hold it equally clear, that we should be governed by the general custom." This is a clear recognition of the power of custom to regulate the liability of common carriers, and I need not further multiply cases to prove a matter so consonant to reason as this. The cases cited by the plaintiff in error are good law, but relate to adjudications on the law of carriers, without any reference to the question here, viz.: How far it is within the usage and course of business to modify the duties and liabilities of common carriers. But, in all cases where this is relied upon by the carrier, the custom or usage must be clearly proved, and that the

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employer knew it, or is presumed to know it, by reason of its generality in the neighborhood where it is claimed to exist.

The case below was well ruled. Both points, the delivery of the sugar and the custom, were found, on proper instructions, in favor of the defendant. There being no error in the record, the judgment is
Affirmed.

 AMERICAN EXPRESS Co., plaintiff in error, v. SECOND NATIONAL BANK.

(60 Penn. St. 304.)

Express company — liability beyond route — effect of restrictions.

An express company received a package of money from a bank at T., to be transmitted to L., and in their receipt they undertook to "forward to the nearest place of destination reached by this company." By the conditions in the receipt, the company were not to be liable "except as forwarders only, * * * or for any default or negligence of any person or corporation to whom" the package should be delivered, "at any place of the established route run by this company," and such person or corporation was to be taken to be the agent of the consignor. To reach L., the package was carried by three other express companies, but the consignee at L. refused to receive it, and directed it to be returned to T., to which place it was carried by the same routes. On its arrival there, and return to the bank, it was found that part of the money had been abstracted. In an action by the bank against the express company at L., the judge charged that the company were bound by the contract to carry the package safely to L., and that the burden of proof was on the company to show how the loss occurred. *Held* error, and that at most the defendant company were liable as carriers only to the end of their route, and beyond that only as forwarders; also, that the jury should have been instructed that, if the evidence satisfied them that the loss had not occurred on defendant company's route, either in going or returning, but on some other part of the route, and that, in the performance of their duties as forwarders, they had used reasonable diligence in the selection of proper carriers, defendant company were not liable.

ACTION by The Second National Bank of Titusville against The American Express Company, to recover for the loss of part of a package of money, delivered to defendants to be carried to Lancaster, Penn. The package contained \$1,900 when delivered to

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defendants, and was addressed to Amos Funk, Lancaster, Penn. The route of defendants extended only to Corry; from Corry to Lancaster, three other express companies successively had the route. The receipt given to plaintiff was as follows:

"AMERICAN EXPRESS COMPANY,
 "TITUSVILLE, Penn., *May 25th*, 1866. }

"The American Express Company do a general express business between all the principal cities and towns of the States of New York, Kentucky, Wisconsin, Western Pennsylvania, Michigan, Missouri, Ohio, Illinois, Minnesota, Indiana, Iowa, Canada, and connecting with other responsible expresses to all parts of the world.

"LIVINGSTON, FARGO & Co., Buffalo.

"WELLS, BUTTERFIELD & Co., New York."

"Received of Second National Bank, Titusville, Penn., one package, said to contain bank notes valued at nineteen hundred dollars, marked Amos Funk, Esq., Lancaster City, Pennsylvania, which we undertake to forward to the nearest point of destination reached by this company, subject expressly to the following conditions, viz: This company is not to be held liable for any loss or damage except as forwarders only, nor for any loss or damage by fire, by the dangers of navigation, by the act of God, or of the enemies of the government, the restraints of government, mobs, riots, insurrections, pirates, or from or by reason of any of the hazards or dangers incident to a state of war. Nor shall this company be liable for any default or negligence of any person, corporation or association, to whom the above described property shall or may be delivered by this company, for the performance of any act or duty in respect thereto, at any place or point off the established routes or lines run by this company, and any such person, corporation or association is not to be regarded, deemed or taken to be the agent of this company for any such purpose, but, on the contrary, such person, corporation or association shall be deemed and taken to be the agent of the person, corporation or association from whom this company received the property above described. * * * The party accepting this receipt hereby agrees to the conditions herein contained.

"For the proprietors.

"O. J. BENHAM, *Agent*."

The package reached Lancaster, and Funk, on being notified of its arrival, called at the express office, declined to receive it and

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directed it to be returned to Titusville. On its arrival at Titusville it was re-delivered to the bank, when it was found to have been opened and \$1,300 abstracted therefrom. At the trial the judge charged as follows:

"The conclusion of the whole matter is this: The defendants being common carriers, received this package of money consigned to Lancaster, under an implied contract to take or send it by careful and responsible hands to its destination. They declare, on the bill of lading or receipt, that they are doing business with such companies to all parts of the world. Not having delivered it to the consignee, they return it to the owner as sound, demand and receive pay for its safe transmission both ways as sound, and it proves to have been damaged while out of the possession of the plaintiffs \$1,300 worth.

"The law attaches negligence to the party thus receiving and returning the goods or package. To absolve themselves from liability for this negligence, the burden of proof is on the defendants to show how the loss occurred, so that the jury may judge whether it was altogether without any fault of theirs. You must judge from all the evidence whether the defendants have been guilty of negligence, or are exonerated from liability.

"If, then, you believe, from the evidence, that plaintiffs did inclose \$1,900 in the envelope, sealed up and gave it to the defendants in that condition, and that there was but \$600 in the envelope when it was returned to the plaintiffs, and that the defendants have not accounted for the loss in a manner satisfactory or consistent with their freedom from blame, then the law presumes the loss to have occurred through their negligence and they are liable."

The verdict was for plaintiff. Defendants took out a writ of error.

P. Church, for plaintiffs in error.

W. S. Morris (with whom was *Douglass & McCoy*), for defendant in error.

SHARSWOOD, J. A fundamental error runs through and infects the whole charge and the answers of the learned judge below to the points presented, which renders it unnecessary to discuss the assignments in detail. He instructed the jury more than once that the

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express company had agreed to carry or send the package in question safely to Lancaster and deliver it to Mr. Funk, to whom it was directed. He entirely put aside, as of no validity, the special contract contained in the receipt, actually filled up by the bank, and accepted by them, undoubtedly with full knowledge of its stipulations. He put this, it would seem, on two grounds, both of which are unquestionably true, but have no application to the case, viz.: First. That common carriers cannot so limit their liability, by special notice or contract as to exempt themselves from the consequences of their own or their servants' negligence; and Second. That if property is received by a common carrier, and he fails to deliver it safely at its place of destination, the burden is on him to prove that it was not lost or injured while in his custody; and in general, the only way in which he can do this satisfactorily is by proving when, where, and how the loss did actually occur. There was, however, in this case, no attempt to relieve the common carrier from the necessity of proving to the satisfaction of the jury that the package, after its delivery to the express company, was not broken open and rifled of part of its contents while in the possession and custody of any of their officers or agents. The learned judge thought, and so charged, that it was incumbent on them to prove affirmatively where, when and by whose negligence, or otherwise, the loss had actually happened. We think, however, that this rule is not applicable to the case. By the express terms of the contract contained in the receipt, the express company undertook only to forward to the nearest point of destination reached by them, and upon this, among other conditions, that they were not to be liable for any default or negligence of any person or corporation to whom they might deliver it at any point off their own established route or line. If they were carriers at all, it was only to the nearest point of destination; beyond that they were forwarders only. There was nothing unreasonable, unusual or unlawful in such a contract. It is very well settled that forwarders are not insurers as common carriers. They are liable only as ordinary bailees to carry for hire. "A person," says Mr. Justice STORY, "who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight, is not to be deemed a common carrier, but a mere warehouseman or agent." Story on Bailees, § 502; Chitty on

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Carriers, 18; *Hooper v. Wells*, 5 Am. Law Reg. N. S. 16; *Jenneson v. The Camden and Amboy Railroad Co.*, 4 Am. Law Reg. 234; *Camden and Amboy Railroad Co. v. Forsyth*, 61 Penn. St. 81.

To hold that a forwarder merely is bound not merely to clear his own skirts of negligence, but to prove when, where and how, the loss occurred, would be to impose upon him an obligation which attaches only to a carrier, and not to an ordinary bailee for hire. A carrier who is bound, at all events, to deliver safely, must bring himself, by positive evidence, within the exceptions, the act of God, or public enemies. Not so an ordinary bailee. It is enough for him to satisfy a jury, by the best evidence in his power, that he has performed his duty with care and fidelity, and that the loss has not arisen from any default of himself or his servants. The jury then should have been instructed that if the evidence satisfied them that the loss had not occurred between Titusville and Corry, either in going or returning, but on some other part of the route, and that, in the performance of their duties as forwarders, they had used all usual and reasonable care and diligence in the selection of proper carriers, their verdict should be for the defendants.

Judgment reversed, and venire facias de novo awarded.

GRANT, plaintiff in error, v. CITY OF ERIE.

(60 Penn. St. 420.)

Municipal corporation — damage resulting from neglect to maintain reservoir.

By an act of the legislature, a city was empowered to make a sufficient number of reservoirs "to supply water in case of fire." Under this act a reservoir was constructed, but was afterward partially destroyed by the city, so that when a fire occurred on plaintiff's premises, near by, there was no water in the reservoir to extinguish it. In an action against the city for damages, *held*, that plaintiff could not recover, on the ground that it was discretionary with the city to construct or maintain the reservoir. (*See note p. 275.*)

ACTION by Benjamin Grant against the City of Erie. Plaintiff alleged that he was the owner of buildings in Erie, which were destroyed by fire February 1, 1868; that, by an act of the assembly

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of 1833, the borough of Erie was authorized "to make and establish a sufficient number of reservoirs to supply water in case of fire;" that reservoirs had been constructed in pursuance of this authority, one of which was located near plaintiff's buildings; that in 1867, in arranging their sewerage, part of this reservoir was removed, and it was not afterward repaired; that at the time of the fire there was no water in the reservoir, and, in consequence, the plaintiff's buildings were destroyed. At the trial, the judge charged that the construction and keeping in repair of the reservoirs was discretionary with the city, and that the city was not liable. Verdict for defendants. Plaintiff took out a writ of error.

J. R. Thompson and C. H. Ourtis, for plaintiff in error, cited *Powell v. Salisbury*, 2 Younge & Jervis, 391; *Conrad v. Ithaca*, 16 N. Y. 159; *Hutson v. New York*, 9 id. 163; *Shear. & Redf. on Neg.* 157, § 130; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 468; *Furze v. New York*, 3 Hill, 612; *People v. Albany*, 11 Wend. 543; *McCombs v. Akron*, 15 Ohio, 474; *Scott v. Hunter*, 10 Wright, 192; *Davenport v. Ruckman*, 37 N. Y. 568.

E. Babbitt, for defendant in error, cited *Carr v. N. Liberties*, 11 Casey, 324; *Fowle v. Alexandria*, 3 Pet. 398; *Ryan v. New York Central Railroad*, 35 N. Y. 210; *Pennsylvania Railroad v. Kerr*, 62 Penn. St. 353.

SHARSWOOD, J. We consider the principles involved in these assignments of error to have been authoritatively ruled in *Carr v. The Northern Liberties*, 11 Casey, 324, and unless that decision is to be overruled the judgment below must be affirmed. In that case, a power was conferred by its charter upon a municipal corporation "to build and erect from time to time, as might become necessary, sufficient close culverts in and over the common sewers established in the district." The municipality did proceed to build culverts in exercise of the power granted by the act of incorporation. The plaintiff alleged, and gave evidence tending to prove, that the culverts were not sufficient to carry off the water falling in a heavy rain; that in consequence his store had been overflowed, and his stock of goods therein damaged. Chief Justice LOWRIE, before whom the cause was tried in the court of nisi prius, at Philadelphia, without hearing any evidence for the defendants, entered a judgment of non-

suit, and the judgment was affirmed by this court. The same learned judge before whom the case had been tried, in delivering the opinion affirming the judgment, said: "We do not admit that the grant of authority to the corporation to construct sewers amounts to an imposition of a duty to do it. Where any person has a right to demand the exercise of a public function, and there is an officer, or set of officers, authorized to exercise that function, there the right and the authority give rise to the duty; but when the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed." It is not easy to perceive any ground for a distinction between the facts of that case and of those presented upon this record.

By the ninth section of the act of April 8, 1833, incorporating the borough of Erie, the burgess and councils of the said borough were, among other things, authorized and empowered "to make and establish a sufficient number of reservoirs to supply water in case of fire." In pursuance of this authority, they did make and establish a number of reservoirs, among them the one in question, at the intersection of French and Fifth streets. This reservoir was allowed to fall into decay — was never repaired, and became so leaky that it was insufficient for the purpose for which it was constructed. The plaintiff alleges that, in consequence, a valuable block of buildings, which he owned in the neighborhood, having taken fire was entirely consumed, there being no water in the reservoir to extinguish it. To what extent, if the water had been there, it might have succeeded in arresting the fire, and preventing the entire damage which he suffered, is a matter of conjecture only, but it may be admitted that it would to some extent. But the same reason existed in the case of the insufficient culvert. To some extent, it probably would have prevented the injury to the plaintiff if it had been sufficient. We do not say, because it is not necessary to say, whether, if a duty had been imposed upon the municipality, and not a mere discretionary authority conferred upon them, that their negligence in the premises would not have constituted a good cause of action. It may be doubted whether it would be a case to which the maxim *causa proxima non remota spectatur* has any application. The purpose of the reservoir being to extinguish fires, and the fire having been shown not to have been extinguished, in consequence of the non-performance of the duty imposed, it would be no answer, perhaps, to say that the proximate cause of the injury was the fire, and the

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want of water only the remote cause. If it were made the duty of a municipality to station a police officer at a particular corner, to protect the foot passengers from being run over by passing vehicles, it may be doubted whether it would be an answer to an action, to say that the cause of the injury was the horse and wagon, and not the absence of the officer. But if the municipality were vested with the authority to employ and keep on foot a sufficient police, no one can surely pretend that a foot passenger, run over by a wagon, could sue the corporation for damages, even though he should be able to show that they had formerly kept an officer at that place for that purpose, and had withdrawn him, or that he had been guilty of negligence in the performance of his duties. That would be a case precisely analogous to the one now before us.

Judgment affirmed.

NOTE. — In *Wheeler v. City of Cincinnati*, 2 Am. R. 368, it was held that a city, authorized by statute to establish a fire department and procure engines, etc., necessary to extinguish fires, is not liable to an individual whose house has been burned, for any defect in the execution of such power, nor for a neglect of duty on the part of fire companies or their officers. — REP.

ROSHI'S APPEAL.

(60 Penn St. 462.)

Ecclesiastical law — title to property, etc., of a divided congregation.

The title and use of the property of a divided congregation, and the offices pertaining thereto, belong to that portion which adheres to the denomination and conforms to its rules.

A classis of the German Reformed church of the United States, sitting as an ecclesiastical court, declared certain offices held by defendants vacant. Held, that this decision was binding on the civil courts. (*See note, p. 288.*)

BILL in equity filed by Andrew Koehler, Henry Roshi, Henry Shaffer, Conrad Reitz and John Kramer against Peter Roshi, Adam Hill, Jacob Bauer, Adam Sundaker and Robert Koehler, praying that the respondents be declared trespassers and intruders on certain church property and offices, and that an injunction be granted restraining the defendants, and any one under them, from inter-

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fering with the said church property; and for general relief. The case was referred to a master.

The master reported that the congregation had been organized in 1835, by the Rev. Philip Zaiser, as minister of the German Reformed church in the United States, by the authority of the synod, who upon his report accepted it as a member of that church, and the lot was conveyed for their use. St. Paul's classis was formed in 1861, and the church was represented in it by a lay delegate, in each of the years from 1861 to 1867 inclusive. On the 1st of January, 1868, Peter Roshi, Adam Hill, Jacob Bauer and Adam Gundaker were elected elders and deacons; and then Rev. Robert Koehler took charge of the congregation as pastor, and the congregation soon after divided into about equal parts. On the 21st of January, 1869, complaint was made to two of the elders, charging Mr. Koehler with immoral conduct, and demanding an investigation; the investigation was denied. Complaint against this action was made to St. Paul's classis, who appointed a committee to investigate the matter and report such action as might be proper to the next annual meeting of the classis.

"The committee, among other things, reported, that the parties in possession denied the authority of the classis, and were not served by one of her ministers and disregarded the rules of the Reformed church; that those acting with the complainants were a majority of the original congregation, and were faithful to the authority of the church, and had been imposed on by men who improperly style themselves the consistory of Greenwood church, and who had forced on the congregation R. Koehler as a minister, without submitting to an election of the people; the report of the committee set out other failures of duty by the consistory; and further, that they allowed R. Koehler to preach while under a charge for immoral conduct, and the committee had ascertained the charge to be well founded; although the consistory refused to take notice of the complaint, all the consistory but one had been acting without having been regularly installed. Under all the facts, the committee concluded that the Greenwood church had no properly constituted consistory, and that the offices of elders and deacons were vacant. They further reported that the congregation had been founded as "a German Reformed congregation, subject to the authority of the German Reformed church," and in that capacity acquired the property; that the church had been served for about twenty-eight years, except three or four

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years of trouble in the church, by German Reformed ministers; the church had been, on her own application, united by the classis with other congregations to make a change; had participated during that time in the election of delegates to classis and by numerous other acts shown that she regarded herself "a member of our church," and it would be gross neglect in the classis to permit its destruction "as one of our body by non-interference and silence against the machinations of secession and infidelity." The committee recommended the passage of resolutions by the classis as follows:

"1. That the German Reformed congregation at Greenwood was a member of the German Reformed church in the United States; that St. Paul's classis had jurisdiction of the congregation, and that any one not acknowledging that jurisdiction could not be an officer or member of the congregation.

"2. That the offices of elders and deacons of the church be declared vacant.

"3. That the members adhering to the faith, discipline and doctrine of the German Reformed church be required to meet, on proper notice, on or before the 15th day of July, 1869, to elect elders and deacons, to act as a consistory and a board of trustees in the congregation.

"These resolutions were adopted by the classis, June 7, 1869, and on the 22d of the same month the complainants were elected elders and deacons.

"The congregation was part of the Watson Run charge; Rev. Frederick Wahl was installed pastor over the two congregations in May, 1869, and preached to the Greenwood congregation on three Sundays, the last being on the 5th of September, 1869, since when the defendants took possession of the church and hold it against the plaintiffs."

The master decided "that this church is a member of the German Reformed church of the United States and of St. Paul's classis, and subject to the ecclesiastical jurisdiction of said classis. This congregation became divided in 1868; the division originated in the selection of Rev. Robert Koehler as minister or pastor of the church. The plaintiffs claimed that Rev. Koehler was unfit for the place assigned him, and made complaint against him to the defendants, the elders and deacons of the church, who had been elected January 1, 1868, charging Koehler with immoral conduct, and demanding an investigation of the charge. This demand not being complied with,

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St. Paul's classis, on complaint made to them, instituted the inquiry, and sitting as an ecclesiastical court, decided and so recorded on their minutes, at their annual meeting held at Brady's Bend, Penn., January 7, 1869, that said classis have ecclesiastical jurisdiction of this church, and declared the offices held by the defendants vacant. This decision is binding upon our courts. * * * * *

"As to the title of the property and the right to its use, which seems to be the important point in dispute between these parties, I can come to no other conclusion than that it belongs to the German Reformed congregation of Greenwood township (now Union township), to those who approve of the doctrines professed and the forms of worship in practice in the government of the church with which it was connected at the time the trust was declared, and is so whether they be a minority or majority of the congregation."

After exceptions by the defendants, the court confirmed the report and decreed:

"That the ownership and control of said property and house of worship is in the complainants as trustees thereof, and in the congregation which they represent, and that possession thereof be delivered to them as such trustees and representatives, and that respondents be perpetually enjoined from interfering therewith in any other mode or manner than that permitted by the rules, regulations and discipline of the German Reformed church of the United States.

The defendants appealed to the supreme court.

C. R. Marsh and Douglass & McCoy, for appellants. It is not an implied condition of the grant, in trust for the use of the German Reformed church and congregation of Greenwood, that the church shall remain connected with any particular church judicatory. *Presbyterian Congregation v. Johnston*, 1 W. & S. 9; *Lutheran Congregation of Pine Hill v. St. Michael's Evangelical Church*, 12 Wright, 20. The appellees had a remedy at law, and the court of equity will not interfere. *Gallagher v. The Fayette Railroad Co.*, 2 id. 102; *Updegraff v. Crans*, 11 id. 103; *Patterson v. Lane*, 11 Casey, 275; *Rife v. Geyer*, 9 P. F. Smith, 393; *Phipps v. Jones*, 8 Harr. 260.

C. M. Brush and S. M. Pettis, for appellants, cited *Kisor's Appeal*, 12 P. F. Smith, 428; *Gump's Appeal*, 15 id. 476; *Schnorr's Appeal*, 17 id. 138 (5 Am. R. 415).

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SHARSWOOD, J. The question whether, under the equity powers conferred by the act of assembly of June 16, 1836, upon the courts of common pleas, those courts have jurisdiction of such a cause of complaint as is set forth in the bill in this case has been considered and settled by this court in *Kisor's Appeal*, 12 P. F. Smith, 428. It had often been assumed and exercised without dispute, and with the implied recognition of this court. If a private partnership or a corporation falls into confusion affecting all its members, there is no adequate remedy at law — no better remedy than a proceeding in equity to settle the rights of the parties, and to stay, by injunction, the inconvenience and disturbance caused by opposite factions pretending to act as the society. *Kerr v. Trego*, 11 Wright, 295. "It is the very remedy," said Chief Justice LOWRIE, "usually adopted when churches divide into parties, and we applied it in three such cases in the last year. Therein we decided directly on the rights of property, because that became the aim." Indeed, a religious society, incorporated or unincorporated, is but the trustee of a charity, and it has always been peculiarly within the province and duty of a court of equity to prevent the diversion of property, held in trust for such purposes, from the object and design of the original endowment. Hence, it is not merely because the courts of common pleas are invested with the jurisdiction and powers of a court of chancery, so far as relates to "the supervision and control of unincorporated societies," as well as corporations, but also as to "the control of trusts," and "the care of trust property," that the jurisdiction of the court below in this case must now be considered as beyond all question.

The principle which governs in all such cases is old and well settled, and has been frequently asserted by this court. Whenever a church or religious society has been originally endowed in connection with, or subordination to, some ecclesiastical organization and form of church government, it can no more unite with some other organization, or become independent, than it can renounce its faith or doctrine, and adopt others. Indeed, in many churches, its ecclesiasticism or form of church government is an important, if not a fundamental, point of doctrine. It is based, in their view, upon a scriptural model or teaching. Thus, government by diocesan bishops, and the three orders of the ministry — bishops, priests and deacons — is part of the doctrine, as well as the order, of the established church of England, and her daughter, the Episcopal church

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of this country. On the other hand, the established church of Scotland, and, for the most part, the reformed churches of the continent of Europe, and all those who have derived their succession from them, hold to the doctrine of the perfect parity of ministers, and government by presbyteries or classes and synods. "I approve," said Mr. Justice BURNSIDE, in *App v. Lutheran Congregation*, 3 Barr, 201, "of the doctrine of Lord ELDON, in the case of *The Attorney-General v. Pearson*, 3 Meriv. 400, that it is the duty of the court to decide in favor of those, whether a minority or majority of the congregation, who are adhering to the doctrine professed by the congregation, and the form of worship in practice, as also in favor of the government of the church in operation, with which it was connected at the time the trust was declared." *McGinnis v. Watson*, 5 Wright, 9; *Sutter v. The Trustees of the First Reformed Dutch Church*, 6 id. 503. "The title to the church property, of a divided congregation, is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute began, are the standard for determining which party is right." Id.

There is no difficulty in the application of this principle to the facts of this case, as reported by the master, and in which we think, with the court below, that he was fully sustained by the evidence before him. The church, now the subject of controversy, was organized in 1835, by the Rev. Philip Zaiser, a minister of the German Reformed church of the United States, acting by the authority of the synod of that church. His action was reported to the synod, and approved by that body. The church was formally accepted as one of its constituent members. In 1836, the lot, upon which the present building now stands, was conveyed by Thomas Astley to Peter Stein, Philip Huber and John Roberts, "trustees of the German Reformed church," "in trust for the use of the said German Reformed church."

The German Reformed church of the United States was, at that time, a distinct ecclesiastical organization, not merely having adopted the Heidelberg catechism as the confession of its faith, but having a written constitution, a settled form of government by ecclesiastical judicatories, four in number, in regular gradation, from the lowest to the highest, having cognizance of ecclesiastical matters, though their power, of course, was wholly spiritual. First, the consistory, the primary governing body of each church or con-

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gregation, composed of the minister or ministers of that church, together with the elders and deacons, as the representatives of the people. Second, the classis, consisting of all the ministers and delegated elders of the congregations, within a certain designated territorial district. Third, a synod, consisting of the ministers and lay delegates of the several classes embraced within its prescribed geographical limits. And, fourth, the general synod, the highest judicatory of the church, and the court of last resort, composed of ministerial and lay delegates, elected by all the classes respectively, according to a prescribed ratio of representation. By organizing as a German Reformed church, the society in question, *ex vi termini*, agreed to submit its spiritual regulation to this constitution and form of government. It agreed, especially, that the classis within whose bounds it should happen to be should decide all cases "respecting either ministers or congregations which may arise within their jurisdiction." Const. of German Reformed church, art. 51. And "that before a call is accepted by a preacher it shall be submitted to synod or classis." Id., art. 52. They could settle no preacher as their minister, except with the approbation of the classis or synod to whose jurisdiction they were subject. If, therefore, in 1854, this congregation did adopt for themselves a constitution, by which they attempted to become independent of all ecclesiastical authority, it was *ultra vires*. They might, indeed, as individuals, have formed any kind of church they pleased, independent or connected with any other ecclesiastical organization. The land was before them, but then they must cease to be a German Reformed church, and abandon all claim of right to hold any of the property of that church. It was a part of their religious liberty, guaranteed to them by the constitution of the commonwealth, to separate from their former association, if they became dissatisfied with its faith or order, and build for themselves another church, and organize on other principles; but it was no part of that liberty to appropriate to themselves, in their new capacity, property which had been solemnly consecrated to other uses. But, in fact, the constitution of 1854 did not pretend to throw off allegiance to the judicatories of the church, though some of its provisions may have been inconsistent with the general constitution. After its adoption, for many years — up to the period when this controversy arose — it continued to be served by ministers of the German Reformed church, approved by the classis. It was represented by an elder, from time to time, in that body. The

classis to which it was attached held a meeting or meetings within its walls. It made contributions in money to defray the expenses of the classis. Its minister's salary was, on one occasion, supplemented from the general missionary funds of the church; and, in 1863, on the occasion of the third centennial anniversary of the foundation of the German Reformed church, it held a religious festival in common with all its sister churches of the same communion. In view of these, and many other facts of the same nature, disclosed by the testimony, it ought not now to be denied that the church in question was and continued to be a German Reformed church, subject to the spiritual jurisdiction of the proper judicatories of that church.

The dispute which has given rise to this proceeding began with a certain portion, we may admit a majority, of the congregation undertaking to call and settle a minister, without having his call submitted to, and approved by, the classis or synod. That it was entirely within the scope of the proper jurisdiction of the classis of St. Paul, within whose bounds this church is situated, to institute an investigation, and act upon its own motion in such circumstances, is abundantly clear. By article 51 of the constitution, the classis are to take "cognizance of whatever concerns the welfare of the congregation, committed to their care, and which does not come within the power of a consistory." When the consistory of a particular congregation undertakes to declare itself independent of the classis, and to act in defiance of the general and fundamental law of the church, it is not only the right, but the duty, of the classis to declare that they no longer hold the offices to which they were elected, and to provide for the election of another consistory by those who still adhere to the order and discipline of the church. It is an emergency which can be met and provided for in no other way. Nor have the defendants in this bill any right to take exception to the regularity of the proceeding, or to complain that they had no notice, and were condemned unheard. They disclaimed the jurisdiction of the classis. In their answer to this bill, they continue to disclaim it. They utterly deny that this church has ever been a member of, or connected with, the classis or synod of the German Reformed church. They distinctly admit the charge of the bill, that the respondents do aver and declare themselves "to be an independent body, and not subject to the ecclesiastical jurisdiction of St. Paul's classis, the synod of the German Reformed church, or any other ecclesiastical body." By their own act, they are strangers

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and aliens, and had no right to notice of any proceedings affecting the church. The whole case is then reduced to this one simple question, whether, being such an independent body as they declare themselves to be, they have any right or title to the lot, with the building thereon erected, which, as we have seen, was conveyed "in trust for the German Reformed church;" and can withhold the possession and enjoyment of it from those who, under the orders of the proper judicatory, have been chosen to represent that portion of the congregation who adhere to the faith, order, government and discipline of their church. To this question there can be but one answer in law, equity, good conscience, justice, as well to the living as the dead, and according to the precepts of that divine master who has taught us to do unto others as we would that others should do unto us.

Decree affirmed, and appeal dismissed at the cost of the appellants.

NOTE. — To the same effect is *Schnorr's Appeal*, 5 Am. R. 415. The holders of the legal title to church property are regarded in a court of equity as holding it in trust for the maintenance of the faith and worship of the founders of the organization, and any diversion of it to another use is so far a breach of trust as to demand the interposition of the court. *Harmon v. Dreher*, 1 Speer's Eq. 87; *Kniskern v. Lutheran Church*, 1 Sandf. Ch. 489; *Attorney-General v. Pearson*, 3 Meriv. 358; *Baker v. Fales*, 16 Mass. 487; *Stebbins v. Jenkins*, 10 Pick. 172; *Watson v. Jones*, 1 Zab. 653.

A different rule prevails in New York. In *Petty v. Took*, 21 N. Y. 267, it was held that the trustees and a majority of the society could change from Congregationalists to Presbyterians, and retain possession of the church property against those who adhered to the faith of the founders of the church and society. See, also, *Gram v. The Prussian, etc., German Society*, 36 N. Y. 161; *Bunnell v. The Associate Reformed Church*, 44 Barb. 282; *Robertson v. Bullions*, 11 N. Y. 243.—REP.

COMMONWEALTH v. BIRDSALL, plaintiff in error.

(69 Penn. St. 482.)

Criminal law — indictment charging separate offenses. Double sentence

An indictment contained two counts: The first charged the defendant with breaking and entering a store-house; the second charged him with stealing the goods. He was found guilty under both counts, and the judge imposed a distinct sentence on each count. *Held*, not erroneous.

INDICTMENT against James Birdsall. The opinion states the case. The writ of error was brought by defendant.

A. G. Cochran (with whom was *R. S. Morrison*), for plaintiff in error. Where a criminal act has been committed, every part of which may be alleged in a single count in an indictment, and proved under it, the act cannot be split into several distinct crimes and a separate indictment sustained upon each. And wherever there has been a conviction for one part, it will operate as a bar to any subsequent proceedings as to the residue. *State v. Benham*, 7 Conn. 414. Burglary and larceny can both be included in a single count, when they are a part of the same act. *Commonwealth v. Tuck*, 20 Pick. 356; *Commonwealth v. Hope*, 22 id. 1; 2 Russell on Crimes, 40; Wharton's Criminal Law, 383; *Rex v. Withal*, 1 Leach, 102; *Josslyn v. Commonwealth*, 6 Metc. 236; *Larned v. Commonwealth*, 12 id. 244.

L. B. Duff, for commonwealth.

AGNEW, J. The indictment in this case contains two counts; the first for willfully and maliciously breaking and entering a storehouse or shop, with *intent* feloniously to steal, take and carry away goods and chattels. This count is framed upon the second section of the act of 22d April, 1863 (Pamph. Laws, 531), and specifies no particular goods. The second count was for simple larceny, enumerating the goods in detail. The defendant was found guilty under both counts, and on the first was sentenced to pay a fine of six cents, and to imprisonment by separate and solitary confinement in the western penitentiary for four years; and, on the second, was sentenced to pay a fine of six cents, and to imprisonment by separate and solitary confinement in the western penitentiary for one year and six months, to be computed from and after the termination of the first sentence. It is alleged that the conviction and sentence under both counts are erroneous. But the very excellent argument for the plaintiff in error has failed to convince us. The authorities in support of the conviction are to be found collected in Mr. Wharton's Am. Crim. Law (ed. 1868), §§ 415, 416, 417, 421. It cannot be objected in error, he says, that two more offenses of the same nature, on which the same or a similar judgment may be given, are contained in different counts of the same indictment; nor can such objection be maintained either on demurrer or in arrest. § 415. In section 421, he says, where a prisoner is found guilty generally under an indictment containing two counts, neither of which is defective, it is no ground of objection to the verdict that it does not state

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upon which count it was found. In our own State the authorities are no less forcible. In *The Commonwealth v. Gillespie*, 7 S. & R. 469, where an indictment containing nine counts charged two distinct offenses, and in two of the counts several defendants, Justice DUNCAN said: "These several charges, as laid in the indictment, are different modes of laying the same offense. But if the offenses were different, separate offenses, it is no objection, either on demurrer or in arrest of judgment, that separate offenses of the same nature are joined against the same defendant. Even in case of a felony, though it be true that no more than one offense should regularly be charged in one indictment, and that the court would quash the indictment before plea, or if, on the trial, the court should think it might confound the prisoner, they may exercise a discretion in compelling the prosecutor to elect on which charge he will proceed; yet, even in felonies, there is no objection to the insertion of several distinct offenses of the same degree, though committed at different times, in the same indictment against the same offender; and it is no ground of demurrer or in arrest of judgment; and counts where offenses are of the same nature, at common law and on a statute, may be joined." In *Harman v. Commonwealth*, 12 S. & R. 69, it was said, at the close of the opinion, that where two offenses are charged in separate counts, if the defendant can make it appear that this mode of proceeding will embarrass his trial, the court can protect him by quashing or by compelling the prosecutor to elect.

The case of *The Commonwealth v. Sylvester*, Brightly's Rep. 331, is directly in point. There this court, on an indictment removed from the mayor's court of Philadelphia, containing two counts, one setting forth a statutory offense, and the other an offense at common law, and a conviction on both counts, held that there was no misjoinder, and sentenced the defendant to pay a fine of \$200, the statutory punishment, on the first count, and to pay a fine at common law on the second. *Henwood v. Commonwealth*, 2 P. F. Smith, 424, is a recent case in which the subject of rejoinder and misjoinder is considered. There the defendants were convicted on the first and third counts of an indictment charging a larceny in the first, larceny as bailees in the second, and a conspiracy to defraud in the third count. In that case the conviction was sustained, this court remarking that neither the interests of justice nor the rights of the defendants are periled by the rejoinder. The plea and the number of challenges are the same, and the punishment the same

in kind, to wit: Separate and solitary confinement at labor. The difference in the degree, that is, between the *maximum* in one and the *maximum* in the other, it is settled, makes no difference.

It has been contended for the plaintiff in error that the larceny and the breaking and entering, charged in the separate counts of this indictment, were done at one and the same time, and, therefore, cannot be punished as separate offenses. If this had appeared in the record, the point would be well taken. But no presumption of identity exists. When, says Mr. Wharton, an indictment charges in one count a breaking and entering a building with intent to steal, and in another count a stealing in the same building, on the same day, and the defendant is found guilty generally; the sentence, whether that which is proper for the burglary only, or for the burglary and larceny also, cannot be reversed on error, because the record does not show whether one offense only or two were proved at the trial; and, as this must be known by the judge who tried the cause, the sentence will be presumed to have been according to the law that was applicable to the facts proved. Am. Crim. Law (ed. 1868), § 417. For this, he cites two cases from 11 Metc. 575-581. There can be no doubt the court of quarter sessions had good reasons for passing the sentence on each count of this indictment; and so the defendant, or his counsel, must have thought, or he would not have suffered three years to run, and when the facts were likely to be forgotten, before taking out a writ of error.

The several sentences in this case are, therefore, affirmed.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

CAREW, plaintiff, v. RUTHERFORD.

(106 Mass. 1.)

Conspiracy to extort money — laborers' associations.

• conspiracy to obtain from a master mechanic money, which he is under a legal obligation to pay, by inducing his workmen to leave him, and by deterring others from entering into his employment, or by threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the demand, is an illegal conspiracy; and the money thus obtained may be recovered back from the conspiring parties, who are, also, liable for all damages to the business of such mechanic occasioned by such illegal acts.

ACTION in tort, and for money had and received, brought by John Carew against Alexander Rutherford and others, of the Journeymen Freestone Cutters' Association, of Boston.

At the trial in the superior court, before BRIGHAM, C. J., without a jury, the judge found these facts:

"The plaintiff in August, 1868, was a freestone cutter at South Boston, and had contracted to furnish cut freestone for various buildings, among which was the Roman Catholic cathedral in Boston, in large quantity and at a contract price of \$80,000. The defendants, and sixteen other persons, all journeymen freestone

cutters, and members of an unincorporated association called the Journeymen Freestone Cutters' Association of Boston, Charlestown, Roxbury, and their vicinities (of which association the plaintiff was not a member), together with eight or ten laborers, who were not journeymen stone-cutters or skilled laborers, and four apprentices to the freestone cutting trade, constituted the stone-cutting force relied upon by the plaintiff to fulfill his said freestone contracts. [The constitution and by-laws of the association were put in evidence; and the material parts of them are printed in the margin.*] On the morning of August 18, 1868, the defendant, William Cbooney, president of said association, who was foreman in the plaintiff's establishment, notified the plaintiff that on the evening of the day before, at a special meeting of the association, it was voted that the plaintiff should pay to the association the sum of \$500 as a penalty imposed upon him by the association because he had sent to New York to be executed some of the freestone cutting to be done under his contract for the cathedral; and, upon the plaintiff's refusal to make such payment, all the journeymen freestone cutters employed by him (among them, the defendants) left the plaintiff's service in a body, agreeably to said vote and the rules of said association. At his request the plaintiff was permitted to appear at a meeting of the association and explain the circumstances which induced him to send a part of the stone-cutting work required for the cathedral to New York to be executed; and, after explaining that his action in that matter was because of his not

* "9. A committee shall be appointed, whenever this association think proper, to wait on the employers concerning a rise and fall of wages.

"10. The consent of two-thirds of the members present at a meeting shall be requisite to decide on adopting measures to obtain higher wages, and the consent of a majority shall be requisite to adopt measures to oppose any, or the least reduction of wages in our trade.

"11. Any employer who shall be known to depreciate our trade shall be firmly discountenanced by this association, and such measures shall be adopted toward him as are not inimical to the laws of this republic, nor to the rights of said employer as a citizen of this republic.

"12. During meeting hours, and especially while at work, this association shall discountenance the least malicious spirit toward employers, except self-preservation should demand it, being fully sensible that in the prosperity of the employer the prosperity of the employed is founded.

"13. That no more than four apprentices be allowed to each firm, or shop, and that the overplus now in each shop be allowed to finish their time of service, and if any employer gives up business it will be legal for members to work with the apprentices of such boss or firm, wherever they shall be sent to finish their time.

"14. This association will not sanction any of its members working for any person who takes a subcontract from a stone-cutter, or a firm that carries on the stone-cutting business.

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having the proper stock for that part of the work when he could procure journeymen to work upon it, and when, having procured such stock, he could not procure a sufficient force of journeymen to work it, there was a motion made and debated, in the association, that the previous vote, to the effect that members should withdraw from the plaintiff's service unless he paid \$500, as aforesaid, should be reconsidered and rescinded; but the association refused to reconsider or rescind the vote. At this meeting, said vote was read to the plaintiff by the secretary of the association. On the same night or the next morning the defendants, Cooney and Shea, and others, told the plaintiff that all the association men in his shop would desert him at once unless he paid the \$500, and that the association refused to rescind the vote. The plaintiff refused to pay, and all his men left his shop at once and in a body, under the lead of Cooney and Shea; and the plaintiff was without men for a week or ten days, and until after he had made the payment of \$500 as hereinafter stated. Previously to the payment of the money, and after the men had left him, Cooney, and others, of the defendants, told the plaintiff that neither these men, nor any association men, would be allowed to work in his shop if he refused to pay the money demanded. In consequence of the withdrawal of the defendants and the other journeymen, the freestone cutting which the plaintiff had contracted to do was stopped, because it was impossible for the plaintiff to procure journeymen or other freestone cutters, who were not members of said association, and who had such skill as was required for the fulfillment of his contracts. Several days after the defendants and the other journeymen had withdrawn from the plaintiff's service, the plaintiff, induced by the necessity of doing so to fulfill said contracts and continue his other stone-cutting work, paid to the defendants, to the use of said association, the sum of \$500, on August 26, 1868; and the defendants and other journeymen, who had withdrawn as aforesaid, returned to the service and employment of the plaintiff. Said payment was made by the plaintiff as follows: He first made a check payable to the order of the association. This the defendants, Cooney and Wagner, refused to take, on the ground that no one of those active in procuring it was willing to indorse it. The plaintiff then made a check payable to Wagner or bearer, and gave this check to Cooney, and he, Wagner, and others went with the plaintiff to the bank, when the money was

passed to Wagner's credit as treasurer of the association. No receipt was given to the plaintiff for this money."

The judge further found as a fact "that the money demanded of the plaintiff was demanded without right, and not under any contract or agreement between him and the defendants."

Upon these findings, the judge ruled that the facts would not sustain the action, and ordered judgment for the defendants. The plaintiff alleged exceptions.

E. F. Hodges and J. F. Barrett, for plaintiff.

S. J. Thomas, for defendants.

CHAPMAN, C. J. The declaration contains a count in tort, and a count for money had and received. The count in tort alleges, in substance, that the plaintiff was engaged in carrying on the business of cutting freestone in Boston, and employed a great many workmen, and had entered into a contract with builders to furnish them with such stone in large quantities; and the defendants, conspiring and confederating together to oppress and extort money from him, and pretending that he had allowed some of said builders, with whom he had made contracts, to withdraw from his shop a part of the work he had contracted to do, and to procure the same to be done out of the State, caused a vote of the Journeymen Freestone Cutters' Association of Boston to be passed, to the effect that a fine of \$500 was levied upon the plaintiff, and read the vote to him, and threatened him that unless he paid the fine they would, by the power of the association, cause a great number of the workmen employed by him, to leave his service; that he refused to pay it, and the defendants caused twelve of his workmen to leave his service for that reason, at their instigation. They further threatened him that, unless he paid the fine, they would, by the power of the association, prevent him from obtaining suitable workmen for carrying on his business, and did so prevent him till he paid the fine, and thus extorted from him the sum of \$500.

Trial by jury was waived, and the facts found by the judge are reported. It appeared that the plaintiff had made a contract to furnish stone for the Roman Catholic cathedral in Boston, and had employed journeymen to do the work, and relied upon them to fulfill his contracts; and the facts stated in the declaration were substan-

tially proved: The plaintiff was not a member of the association. He had sent some of his work to be done in New York because he could not obtain a sufficient force to do it in Boston, and had not proper stock for the work. If the action can be maintained, it is on the ground that the defendants have done the acts alleged, in violation of the legal rights of the plaintiff.

By the Gen. Stats. ch. 160, § 28, which is cited by the plaintiff's counsel, "whoever, either verbally or by a written or printed communication," "maliciously threatens an injury to the person or property of another, with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will, shall be punished" as the section prescribes. As this is a penal statute, perhaps it does not extend to a threat to injure one's business by preventing people from assisting him to prosecute it, whereby he loses his profits and is compelled to pay a large sum of money to those who make the threat, though the threat is quite analogous to those specified in the statute, and may be not less injurious. We shall therefore consider, not whether the acts alleged and proved against the defendants were unlawful within the statute, but whether they were so at common law.

The constitution and by-laws of the Journeymen Freestone Cutters' Association, whose agents the defendants profess to have been, have been laid before us. We have not had occasion to examine them critically; for the doctrine stated in *Commonwealth v. Hunt*, 4 Metc. 111, 129, is unquestionably correct, namely, that when an association is formed for purposes actually innocent, and afterward its powers are abused, by those who have the control and management of it, to purposes of oppression and injustice, it will be criminal in those who misuse it, but not in the other members of the association. Upon the same principle, if the wrongful acts done are tortious, whether criminal or not, the persons who are guilty of the tortious acts will be civilly liable to those whom they have injured. If the defendants have injured the plaintiff unlawfully, the articles of association cannot protect them, and it is immaterial whether persons, who are not parties to the action, are guilty.

The acts charged are alleged to have been done in pursuance of a conspiracy. On this point, if two or more persons combine to accomplish an unlawful purpose, or a purpose not unlawful by unlawful means, their conduct comes within the definition of a criminal

conspiracy, as stated in *Commonwealth v. Hunt*, cited above. If, in pursuance of such a conspiracy, they do an act injurious to any person, he may have an action against them to recover the damage they have done him.

One of the aims of the common law has always been to protect every person against the wrongful acts of every other person, whether committed alone or in combination with others; and it has provided an action for injuries done by disturbing a person in the enjoyment of any right or privilege which he has. Many illustrations of this doctrine are given in *Bac. Ab., Actions on the Case, F.*, among which are the following: "If A, being a mason, and using to sell stones, is possessed of a certain stone-pit, and B, intending to discredit it and deprive him of the profits of the said mine, imposes so great threats upon his workmen, and disturbs all comers, threatening to maim and vex them with suits if they buy any stones, so that some desist from working, and others from buying, A shall have an action upon the case against B, for the profit of his mine is thereby impaired." So "if a man menaces my tenants at will of life and member, *per quod* they depart from their tenures, an action upon the case lies against him." "If a man discharges guns near my decoy-pond with design to damnify me by frightening away the wild fowl resorting thereto, and the wild fowl are thereby frightened away, and I am damnified, an action on the case lies against him." Slander as to one's profession or title is a wrong of a similar character.

The illustrations given in former times relates to such methods of doing injury to others as were then practiced, and to the kinds of remedy then existing. But, as new methods of doing injury to others are invented in modern times, the same principles must be applied to them, in order that peaceable citizens may be protected from being disturbed in the enjoyment of their rights and privileges; and existing forms of remedy must be used. Thus, in the recent case of *Marsh v. Billings*, 7 Cush. 322, the plaintiff, being a hotel-keeper, had a badge on his coaches indicating the name of his hotel. The defendant adopted his badge, and used it fraudulently to entice customers away from his hotel, and was held liable to an action for the damage occasioned to the plaintiff thereby.

In the cases cited above, the injury was done by an individual; but there are other cases where an element of the tort is a conspiracy of two or more persons, who combine together for the purpose of

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doing the wrong. Any person has a right to express, in a reasonable manner, approbation or disapprobation of an actor at a theater. But if several persons combine together to ruin an actor, and hire persons to attend, and with hissing, groans and yells, compel him to desist, and prevent the manager from employing him, such conduct is actionable. *Gregory v. Brunswick*, 6 Man. & Gr. 205.

There are many cases where money has been wrongfully obtained by fraud, oppression, or taking undue advantage of another, without doing him any other injury. This, being tortious, would sustain an action expressly alleging the tort. But in any action for money had and received has been maintained in many cases where money has been received tortiously, without any color of contract. 1 Chit. Pl. (6th ed.) 352. This class of cases is referred to, because they discuss the question, what constitutes an unlawful obtaining of money, such as will subject the party obtaining it to an action for damages.

In *Shaw v. Woodcock*, 7 B. & C. 73, it is said that, if a party making a payment is obliged to pay the money, in order to obtain possession of things to which he is entitled, the payment is not a voluntary, but a compulsory payment, and may be recovered back.

In *Morgan v. Palmer*, 4 D. & R. 283, ABBOTT, C. J., says: That, in order to render a payment voluntary, in the proper sense of the word, the parties concerned must stand upon equal terms; there must be no duress operating upon the one; there must be no oppression or fraud practiced by the other.

In *Cadaval v. Collins*, 4 Ad. & El. 858, money was recovered back which was obtained by abuse of legal process.

In *Wakefield v. Newbon*, 6 Q. B. 276, money extorted from another, by means of the wrongful detention of his goods, was recovered back.

The same doctrine is well established in this country. In *Sortwell v. Horton*, 28 Verm. 373, the principle was stated to be, that money may be recovered back that had been paid in discharge of a claim which was fictitious and false, and known to be so by the party making the claim, and who induced the payment by menaces, duress or taking undue advantage of the other's situation. There are several cases where the action has been maintained to recover back money, which was paid to procure a release of property which the defendant had detained illegally; and, in some of them, the principle is thoroughly discussed. *Chase v. Dwinal*, 7 Greenl. 134; *Harmony v. Bingham*, 2 Kern. 99; *Maxwell v. Griswold*, 10 How. 242; *Cobb*

v. *Charter*, 32 Conn. 358. In *James v. Roberts*, 18 Ohio, 548, the court enjoined a party from enforcing the collection of a note which he had induced the plaintiff to give by threats of a groundless prosecution. *Evans v. Huey*, 1 Bay, 13, was an action on a note. The plaintiff went to the defendant's house in the night, with a party of armed men, and insisted on the defendant's settling and giving him the note. There was no threat or duress, but the court held that, as the circumstances were sufficient to awaken his apprehensions, it was not to be regarded as a voluntary payment.

In the two cases last cited, the principle was enforced by protecting the injured party against a suit.

The cases, in regard to the recovery back of money which has been wrongfully obtained, are very numerous. Many of them are collected in the notes to *Marriot v. Hampton*, 2 Smith's Lead. Cas. (6th Am. ed.) 453. There is a large class of cases in which it cannot be recovered back, like *Marriot v. Hampton*, and like *Benson v. Monroe*, 7 Cush. 125. In the latter case, the defendant had made a claim in good faith, under a statute which he believed to be valid. The plaintiff had preferred to settle and pay it, rather than litigate the matter further. It turned out, by the decision in a subsequent case, that, if he had carried the case to the supreme court of the United States, he would have prevailed, on the ground that the statute was unconstitutional. But neither this, nor any of the other cases, gives any countenance to the idea that money can be obtained by fraud or oppression, and with knowledge that the claim is unfounded, without exposing the party obtaining it to an action.

Without undertaking to lay down a precise rule applicable to all cases, we think it clear that the principle which is established by all the authorities cited above, whether they are actions of tort for disturbing a man in the exercise of his rights and privileges, or to recover back money tortiously obtained, extends to a case like the present. We have no doubt that a conspiracy against a mechanic, who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from him, which he is under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering into his employment, or by threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the illegal demand, is an illegal, if not a criminal, conspiracy; that the acts done under it are illegal; and that

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the money thus obtained may be recovered back, and, if the parties succeed in injuring his business, they are liable to pay all the damage thus done to him. It is a species of annoyance and extortion which the common law has never tolerated.

This principle does not interfere with the freedom of business, but protects it. Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. He may change from one occupation to another, and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men. And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions. *Commonwealth v. Hunt*, 4 Metc. 111, cited above; *Boston Glass Manufactory v. Binney*, 4 Pick. 425; *Bowen v. Matheson*, 14 Allen, 499.

This freedom of labor and business has not always existed. When our ancestors came here, many branches of labor and business were hampered by legal restrictions created by English statutes; and it was a long time before the community fully understood the importance of freedom in this respect. Some of our early legislation is of this character. One of the colonial acts, entitled "An act against oppression," punished by fine and imprisonment such indisposed persons as may take the liberty to oppress and wrong their neighbors by taking excessive wages for their work, or unreasonable prices for merchandises or other necessary commodities as may pass from man to man. Anc. Chart. 172. Another required artificers, or handicraftmen meet to labor, to work by the day for their neighbors, in mowing, reaping of corn and the inning thereof. Id. 210. Another act regulated the price of bread. Id. 752. Some of our town records show that, under the power to make by-laws, the towns fixed the prices of labor, provisions and several articles of merchandise, as late as the time of the revolutionary war. But experience and increasing intelligence led to the abolition of all such restrictions, and to the establishment of freedom for all branches of labor and business, and all persons who have been born and educated here, and are obliged to begin life without property, know that freedom to choose their own occupation and to make their own contracts,

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not only elevates their condition, but secures to skill and industry and economy their appropriate advantages.

Freedom is the policy of this country. But freedom does not imply a right in one person, either alone or in combination with others, to disturb or annoy another, either directly or indirectly, in his lawful business or occupation, or to threaten him with annoyance or injury, for the sake of compelling him to buy his peace; or, in the language of the statute cited above, "with intention to extort money or any pecuniary advantage whatever, or to compel him to do any act against his will." The acts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country; and, if such practices could enjoy impunity, they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both.

Exceptions sustained.

COCHRAN, plaintiff, v. GUILD.

(106 Mass. 29.)

Taxes — incumbrance on land.

Taxes were assessed on land May 1; the tax bill was issued to the collector October 1. *Held*, that the taxes were an incumbrance on the land from May 1. (*See note, p. 297.*)

ACTION on a covenant against incumbrances in a deed of land from defendant to plaintiff. The deed was executed and delivered June 20, 1868. The taxes on the land were assessed May 1, 1868. The tax bill was issued to the collector October 1, 1868. Payment was demanded of defendant, who refused to pay, and plaintiff was obliged to pay the taxes to prevent the land from being sold. The case was submitted on the above facts.

The plaintiff was to recover of the defendant the amount so paid, if the tax was at the date of the deed an incumbrance upon the estate within the meaning of the covenant.

S. L. Thorndike, for plaintiff, was stopped by the court.

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A Russ, for defendant. The tax was not an incumbrance till committed to the collector. Gen. Sta., ch. 12, § 22; *Estabrook v. Smith*, 6 Gray, 572, 576; *Fuller v. Wright*, 18 Pick. Ch. 403; *Prescott v. Williams*, 5 Metc. 429; *Wilson v. Cochran*, 46 Penn. St. 229, 232.

CHAPMAN, C. J. On May 1, 1868, when the taxes were assessed, the land became liable for their payment. It is true that payment was not to be made till the tax bills should be made out and put into the hands of the collector, and all the necessary preliminary steps should be taken on his part. It is also true that they might be collected otherwise than by a sale of the land, and thus its liability might terminate, or it might cease by lapse of time. But they have not been paid otherwise, and the purchaser has been compelled to pay them. He was obliged to pay them in order to relieve the land from a liability to which it was subject when he took his conveyance with the covenant against incumbrances. These taxes had all the characteristics of an incumbrance. What constituted the incumbrance was the present paramount right of the city to hold the land, subject to the payment of the taxes already assessed, if they should not be paid otherwise. It is none the less an incumbrance because the taxes might be collected otherwise. It might as well be contended that a mortgage to secure a note given by a third party was not an incumbrance, because the note might be collected of the maker. It is contended that this is no more an incumbrance than the liability of the land for the taxes that may be assessed in future years. But the obvious difference is, that there can be no liability for an assessment which does not exist, and the covenant relates merely to existing incumbrances.

Judgment for the plaintiff.

NOTE.—To the same effect is *Rundell v. Latoy*, 40 N. Y. 535; *See contra*, see *Korn v. Towley*, 45 Barb. 150.—RHP.

NORTON, adm'rx, plaintiff, v. SEWALL.

(106 Mass. 142.)

Death caused by apothecary's negligence.

Defendant, an apothecary, by his servant, negligently sold, as and for tincture of rhubarb, two ounces of laudanum to P., who procured it for the purpose of administering it, and who did administer it, as a medicine to his servant, the plaintiff's intestate, from the effects of which he died. *Held*, that defendant was liable in damages to plaintiff, the administratrix. (*See note, p. 299.*)

ACTION by an administratrix to recover damages for causing the death of her husband. The opinion states the case. The verdict was for plaintiff in the sum of \$450. Defendant alleged exceptions.

C. Sewall, for defendant.

J. M. Keith, for plaintiff.

GRAY, J. Upon the allegations in the declaration, and the statements in the bill of exceptions, the jury must be taken to have found that the defendant, an apothecary, by his servant, negligently sold, as and for tincture of rhubarb (a well-known and harmless medicine), two ounces of laudanum, a dangerous and deadly poison, to Patten, who procured it for the purpose of administering it, and did administer one ounce of it, as a medicine, to his servant, the plaintiff's intestate, from the effects of which he died. This finding includes a violation of duty on the part of the defendant, and an injury resulting therefrom to the intestate, for which the defendant was responsible, without regard to the question of privity of contract between them. The case is within that of *Thomas v. Winchester*, 2 Seld. 397, which has often been recognized and approved by this court. *Davidson v. Nichols*, 11 Allen, 514, 519; *McDonald v. Snelling*, 14 id. 290, 295; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64.

By the statutes of the commonwealth, "actions of tort for assault, battery, imprisonment, or other damage to the person," survive, and may be prosecuted by the executor or administrator of the party

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injured. Gen. Stats., ch. 127, § 1; ch. 128, § 1. The words "damage to the person," as here used, do not, indeed, extend to torts not directly affecting the person, but only the feelings or reputation, such as breach of promise, slander, or malicious prosecution. *Smith v. Sherman*, 4 Cush. 408; *Nettleton v. Dinehart*, 5 id. 543. But they do include every action, the substantial cause of which is a bodily injury, or, in the words of Chief Justice SHAW, in 4 Cush. 413, "damage of a physical character;" whether the connection between the cause and the effect is so close as to support an action of trespass, or so indirect as to require an action on the case at common law. *Hollenbeck v. Berkshire Railroad Co.*, 9 Cush. 478; *Demond v. Boston*, 7 Gray, 544.

In *Cutting v. Tower*, 14 Gray, 183, cited for the defendant, the action which was held not to come within the Rev. Stats. ch. 93, § 7, declaring that actions for damage done to real and personal estate should survive, was an action for deceit in selling poisoned meal, and the death of the buyer's horses from eating it, was alleged incidentally and by way of aggravation only. It was of such an action, the gist of which was the fraud and deceit, that Mr. Justice BIGELOW was speaking, when he remarked in that case that, if the meal had been made into bread for the buyer's family, and thereby occasioned them sickness and suffering, an action would not have survived for an injury to the person. But in the case at bar, the principal, indeed the only, ground of action is the injury caused to the body of the intestate by the defendant's act.

Exceptions overruled.

NOTE. — See *Loop v. Litchfield*, 1 Am. R. 543, wherein the case of *Thomas v. Winchester*, 6 N. Y. 397 — the leading case on the above subject — is explained and distinguished.

In Kentucky, druggists have been held absolutely liable, notwithstanding any degree of care they may have used, for injuries happening through the mixture of poisons with ordinary drugs. *Fleet v. Hollenkamp*, 13 B. Monr. 319. — REP.

CONNOLLY, plaintiff, v. WARREN *et al.*

(106 Mass. 146.)

Common carrier — what constitutes baggage.

A feather bed, not intended for use on the voyage, is not "personal baggage" of a female passenger by steamship from Ireland to the United States. (*See note, p. 302.*)

ACTION to recover the value of a feather bed, alleged to have been lost by the negligence of the defendants, common carriers, on whose steamship plaintiff was a passenger from Queenstown, Ireland, to Boston, Mass. It appeared that the plaintiff took no property with her for the voyage, beside the feather bed, a pillow, and the clothing she wore; and that she did not intend to use the feather bed on the voyage. She contended that it was a question for the jury, whether the feather bed was personal baggage, incidental to her own transportation. The judge, before whom the case was tried, was not of this opinion; but, with the consent of the parties, directed a verdict for the plaintiff, in order that the opinion of this court might be obtained. In his report of the case, the judge stated that, "if the defendants were bound, under the circumstances, to carry the bed without any payment, beyond what was paid as the price of the ticket, judgment to be rendered on the verdict for the plaintiff; if the question whether the bed was a part of the plaintiff's personal baggage is, under the facts before recited, a question of fact for the jury, the verdict to be set aside, and a new trial ordered; but if, as matter of law, under the circumstances, the defendants were not bound to carry the bed unless paid for its carriage something beyond the price which had been paid for the ticket, the verdict to be set aside, and judgment entered for the defendants."

J. D. Ball, for defendants.

H. N. Sheldon, for plaintiff. It was a question for the jury, and not for the court, whether the bed was personal baggage of the passenger. *Ouimit v. Henshaw*, 35 Verm. 605. And, in determining it, the jury should consider her social rank and the nature of her journey. *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225;

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Duffy v. Thompson, 4 E. D. Smith, 178. Baggage includes every thing appropriate for the personal use of the passenger, unless, in fact, designed for some other purpose. *Brooke v. Pickwick*, 4 Bing. 218; *McGill v. Rowand*, 3 Penn. St. 451; *McCormick v. Hudson River Railroad Co.*, 4 E. D. Smith, 181; *Davis v. Cayuga and Susquehanna Railroad Co.*, 10 How. 330; *Jones v. Voorhees*, 10 Ohio, 145; *Johnson v. Stone*, 11 Humph. 419; *Illinois Central Railroad Co. v. Copeland*, 24 Ill. 332; *Walsh v. Steamboat H. M. Wright*, Newb. 494; *Jordan v. Fall River Railroad Co.*, 5 Cush. 69; *Stimson v. Connecticut River Railroad Co.*, 98 Mass. 83; *Dunlap v. International Steamboat Co.*, id. 371.

MORTON, J. The only contract which the plaintiff had with the defendants was a personal contract for her safe transportation from Queenstown to Boston, to which the carriage of suitable personal baggage was incidental. The facts stated in the report exclude the theory that the defendants were under any liability for the transportation of the bed in question as merchandise. The only question in the case is, whether the jury would be justified in finding that the feather bed was personal baggage, for the loss of which the defendants are liable, under their contract for the safe transportation of the plaintiff.

In *Jordan v. Fall River Railroad Co.*, 5 Cush. 69, the rule is stated to be, "that baggage includes such articles as are of necessity, or convenience, for personal use, and such as it is usual for persons traveling to take with them." In *Collins v. Boston and Maine Railroad Co.*, 10 Cush. 506, the term "baggage" was held not to include articles of merchandise intended for sale, and not for personal use. In *Dunlap v. International Steamboat Co.*, 98 Mass. 371, it was held not to include money, carried in a valise, beyond a sum sufficient for the reasonable traveling expenses of the traveler.

In the case at bar, we are of opinion that the feather bed was not a part of the personal baggage of the plaintiff, and that the defendants are not liable for it under their contract. The case finds that it was not intended for personal use during the voyage. It was an article of furniture, and it is difficult to see how it can any more properly be called personal baggage, than any other article of household furniture. The presiding judge correctly ruled that, upon the facts proved, this was a question of law. It follows that, according

to the terms of the report, the verdict must be set aside, and judgment entered for the defendants.

Judgment for the defendants.

NOTE.—In a recent case in New York, the rule was laid down to be, that "carriers of passengers are responsible for the carriage and safe delivery of such baggage as, by custom and usage, is ordinarily carried by travelers, and that the payment of usual fare includes, in contemplation of law, a compensation for the conveyance of such baggage." *E. D. SMITH, J., in Dexter v. Syracuse, Binghamton and New York Railroad Company*, 1 Am. R. 537 (42 N. Y. 323); see, also, *Edwards on Bailment*, 580; *Story on Bailments*, 499; *Powell v. Meyers*, 26 Wend. 561; *Merrill v. Grinnell*, 30 N. Y. 594; *Macrow v. Great Western Railroad Company*, L. R., 6 Q. B. 612. But the principal question has been, what constitutes "personal luggage," or "ordinary baggage," in the rule of liability laid down? In England, there is an act of parliament styled the Carriers' Act (1 Wm. IV, ch. 88), which makes it the duty of railway companies, etc., to carry a certain quantity of luggage, but in terms limiting it to "ordinary luggage." This very ambiguous phrase, corresponding to what may be regarded as the common-law phrase "ordinary baggage," in America, has been the subject of legal interpretation in at least half a dozen well-considered and elaborately argued cases in the higher courts of England. In *Cahill v. The London and North Western Railroad Company*, 13 Q. B. N. S. 818, it appeared that a passenger presented to the company, as luggage, a box containing only merchandise, but not exceeding in weight the limit prescribed for personal luggage. No information was given to the company of the contents of the box. Held, that he could not recover for the loss of the box. Chief Justice COCKBURN, in this case, said: "If a railway company * * * choose to take, as ordinary luggage, that which they know to be merchandise, I quite agree that it is not competent for them, in the event of a loss, to claim exemption from liability on the ground that the article consists of merchandise, and not of ordinary luggage. But, on the other, if a passenger, who knows or ought to know that he is only entitled to have his ordinary personal luggage carried free of charge, chooses to carry with him merchandise, for which the company are entitled to make a charge, he cannot claim to be compensated in respect of any loss or injury by the company to whom he has abstained from giving notice of the contents." And the same doctrine was enunciated by PARK, Baron, in *The Great Northern Railway Company v. Shepherd*, 8 Exch. 80.

In this latter case, the passenger presented to the carrier for transportation as luggage a carpet bag, a deal box about two feet long, and two brown paper parcels wrapped in a blue checked handkerchief. The carpet bag contained some books and two handkerchiefs—the bag and these articles being valued at £1 2s. 6d. The bag also contained ivory handles, as did also the box and parcels, to the number of two hundred and eighty-three dozen. Held, that the passenger could recover for the loss of the bag, the books and the handkerchief, but not for the loss of the handles, the carrier not being informed of the fact that these articles of merchandise were contained in the luggage presented for carriage.

In *Phelps v. The London and Western Railway Co.*, 19 C. B. N. S. 331, it was held, that the term "ordinary luggage" does not include title deeds belonging to a client which an attorney is carrying with him in his bag or portmanteau, for the purpose of producing on a trial in a court of justice; nor bank notes (to a considerable amount) carried by him for the purpose of meeting the contingencies of the suit. *ERLE, C. J.*, in this case, said: "It is agreed, on all hands, that it is impossible to draw any very well-defined line as to what is and what is not necessary or ordinary luggage for a traveler; that which one traveler would consider indispensable, would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance."

In *Belfast and Ballymena Railway Co., etc., v. Keys*, 9 H. L. 556, it appeared that the passenger took with him into the car of the company a traveling case of the value of £1, containing watches of the value of £1,805. In the course of the journey, a g and

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the company applied to him and desired that the case might be removed to the luggage van, and it was so done. The case was lost, and the passenger brought suit to recover for the contents, not averring in any of his pleadings that the carrier had notice or knowledge that the case contained watches, or even merchandise, and with that knowledge accepted it, to be carried as personal luggage. *Held*, on appeal to the House of Lords, that the passenger could not recover for the loss of the watches.

In *Hudson v. The Midland Railway Co.*, 36 L. T. R. 213, Q. B., decided in 1890, it was held, that a child's toy, called a spring horse, seventy-eight pounds in weight and forty-four inches in length, standing on a flat surface, is not within the regulation of a railway company allowing passengers one hundred and twelve pounds of *personal luggage* (not being merchandise or other articles carried for hire or profit) free of charge.

In this case, HAYES, J., said: "The term 'personal' or 'ordinary' luggage must vary according to the usages of mankind; for example, certain districts of America may be so ill supplied with comforts and conveniences for travelers, as to make it reasonable for them to carry extraordinary things with them; and in some districts a pistol may be part of the ordinary accompaniments of passengers; in former times, it would not have been safe to travel without one in the neighborhood of the metropolis (London), for protection against robbers, though now it would be an exceptional thing." * * * "A person might travel often and never see an article such as this (a spring horse) carried as part of the personal luggage of a traveler; it is clearly exceptional." In *Macrow v. The Great Western Railway, L. R.*, 6 Q. B. 612; 3 Alb. Law Jour. 476; 24 L. T. R. 618 (decided June 7, 1871), a passenger brought suit to recover the value of the contents of a box, received by the defendant carrier as personal luggage. Among the articles which were in the box, were six pairs of sheets, six pairs of large blankets, and six large quilts, which had formed part of the passenger's household furniture, and which he intended to form part of his household furniture at the end of his journey. At the trial, the jury found the sheets, blankets and quilts were *personal luggage*; but the court of queen's bench, on appeal, decided that these articles were not *personal luggage*, within the meaning of the law. COCKBURN, C. J., in delivering the opinion of the court, laid down the following sound and comprehensive rule: "Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage." "This would include," the learned judge continues, "not only articles of apparel, whether for use or ornament, * * * but also the gun case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use and convenience, it follows that what is carried for the purpose of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of 'ordinary luggage,' unless accepted as such by the carrier."

There are numerous American cases which are directed to the interpretation of the phrase "ordinary baggage," as embodied either in statute or common law. The following articles have been held to be included among those which it is *usual* for persons to carry while traveling: A watch and such jewelry as is usually worn about the person (*McCormick v. Hudson River Railroad Co.*, 4 E. D. Smith, 181); tools used by the passenger in his trade (*Davis v. Cayuga and Susquehanna Railroad Co.*, 10 How 380); guns for sporting purposes, and a small amount of material for clothing, in a passage from Europe to America (*Van Horn v. Kermit*, 4 E. D. Smith, 458), and money for traveling expenses. *Orange County Bank v. Brown*, 9 Wend. 85; *Duffy v. Thompson*, 4 E. D. Smith, 173; *Grant v. Newton*, 1 id. 26; *Jordan v. Fall River Railroad Co.*, 5 Osh. 69; *Week v. Saratoga Railroad Co.*, 19 Wend. 684; *Doyle v. Keyser*, 6 Ind. 242; *Davis v. Michigan Central Railroad Co.*, 22 Ill. 278; *Roman v. Maxwell*, 9 Humph. 621; *Hutchings v. Western Railroad Co.*, 25 Ga. 61; *Mad River Railroad Co. v. Fulton*, 20 Ohio 318;

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Jones v. Voorhes, 10 id. 180. In *Merrill v. Grinnell*, 30 N. Y. 584, upon the question of a reasonable amount of money for traveling purposes, it was held, that the "amount must be measured, not alone by the requirements of the transit over a particular part of the entire route to which the line of one class of carriers extends, but must embrace the whole of the contemplated journey, and includes such an allowance for accidents or sickness, and for sojourning by the way, as a reasonably prudent man would consider it necessary to make."

In this case, \$800 in gold coin in the passenger's trunk was not considered to be too large an amount, the intended journey being from Hamburg to New York and San Francisco. In *Dunlap v. The International Steamboat Co.*, 98 Mass. 371, it was held, that the United States statute of 1851, exempting masters and owners of seagoing vessels from liability as carriers for the loss of platina, gold, gold dust, silver, bullion or precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shipped and laden without notice to them and entry on the bill of lading, does not apply to the carriage of passengers and luggage, and that a passenger by a vessel can recover for the loss of money contained in his valise necessary to defray his traveling expenses. But in *The Ionic*, 5 Blatch. 533, it was held, that a gold watch and chain of the value of \$471, gold ornaments for presents of the value of \$450, and American coin to the amount of \$60, were not comprehended within the "baggage," which a passenger from Yucatan to New York might carry.

In *Dexter v. The Syracuse, Binghamton and New York Railroad Co.*, 1 Am. R. 537 (42 N. Y. 326), it appeared that the plaintiff purchased in New York, and checked over defendant's road as baggage, a trunk and contents consisting of wearing apparel for himself and wife, articles for members of his family, and cloth for some dresses, including one for his landlady. The trunk was lost, and, in an action to recover the value of it and contents, it was held, that defendants were liable except for the cloth purchased for the landlady.

In *Mississippi Central Railroad Co. v. Kennedy*, 41 Miss. 671, the trunk of plaintiff contained, among other things, two silver watches and two gold watches, and the court held, "that the watches in the trunk, the plaintiff wearing one upon his person, were clearly no part of the baggage." See, also, *Bomar v. Maxwell*, 9 Humph. 621, where it was held, that a watch alleged to have been in the trunk lost did not fall within the meaning of the term "baggage."

In *Toledo, Wabash and Western Railroad Co. v. Hammond*, 23 Ind. 379 (5 Am. R. 231), it was held, approving *Doyle v. Kiser*, 6 Ind. 242, that the articles of property treated as baggage * * * may be clothing, traveling expense money, a few books for the amusement of reading, a lady's jewelry for dressing, and an opera glass. In *Hopkins v. Wescott*, 6 Blatch. 64, it was held that manuscript books, the property of a student, and necessary to the prosecution of his studies, are "baggage." In *Minter v. Pacific Railroad*, 41 Mo. 503, it appeared that the passenger delivered his trunk and a piece of carpeting to the baggage master of a railroad company who checked the trunk, but told the passenger that no check was necessary for the carpet, as it would go safely. Held, that the company was liable for the loss of the carpet, although the action of the baggage master was in violation of the rules of the company. — Rwp.

Maroney v. Old Colony and Newport Railway Co.

MARONEY, plaintiff, v. OLD COLONY AND NEWPORT RAILWAY COMPANY.

(106 Mass. 158.)

Railroad — regulations as to passengers.

A regulation by a railway company, restricting the holder of a certain class of tickets to special trains, nothing of the kind appearing on the tickets, will not justify the expulsion of the holder of such a ticket from the regular trains, he having taken passage thereon without knowledge of the regulation.

THIS was an action in tort. Trial in the superior court, before ROCKWELL, J., who allowed a bill of exceptions, which was as follows: "It was in evidence at the trial, that the plaintiff, on July 11, 1868, purchased of the ticket-seller of the Cape Cod Railroad Company, at Sandwich, in Massachusetts, a ticket for New York, in the form known as a coupon ticket, the first part of which was for a passage from Sandwich to Middleborough, and the remaining portion in the following form:

Issued by Cape Cod Railroad.			NEWPORT	
MIDDLEBOROUGH	Sandwich.	Present this at office for a berth.	TO	Sandwich.
TO			NEW YORK.	
NEWPORT.			E. N. Winslow, Sup't Cape Cod R. R.	

"It was also in evidence, that he took the morning train on the Cape Cod Railroad, giving the conductor for his passage the first part of the ticket, and arrived at Middleborough, the point of junction with the old line of the Old Colony and Newport Railroad, about nine o'clock, and there entered a train of the defendants' cars, and was carried to Fall River, the conductor of this train, to whom he presented this ticket, punching the same, and allowing him to pass thereon; that, at Fall River, after a short delay, he entered another train of the defendants' cars, being the morning train from Boston to Newport, which came to Fall River by way of Taunton, and not by way of Middleborough; and that, between Fall River and Tiverton, being called upon for his fare by the conductor of

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the last-named train, he presented the ticket, and was informed by the conductor that, by the rules of the defendants, it was good only on the steamboat trains, or trains connecting with the steamboats, of which two were run in the afternoon, and that he must pay the difference in fare (about sixty cents), or leave the train at Tiverton, the next station, and wait for the steamboat train, which passed in the afternoon; that the plaintiff refused to make any further payment, claiming that on said ticket he was entitled to ride to Newport on said train, pass a part of the day at Newport, and then take the steamboat in the evening for New York; that at Tiverton he was removed, or required to leave the train, by the conductor; and that he subsequently jumped upon the train, rode to the next station, Bristol Ferry, there left the train, and some six or seven hours later took the steamboat train at Bristol Ferry, and reached Newport before the departure of the steamboat for New York; that the fare at this time, by reason of competition with other lines, was less from Sandwich to New York than the fare from Sandwich to Newport, of which the plaintiff was informed; that the tickets in the form above described were prepared and issued by the Cape Cod Railroad Company, and had been sold for some months prior to July 11, 1868, by said company, with the assent of the defendants, but the Cape Cod Railroad Company claimed no other right to make contracts for conveyance of passengers over the defendants' railroad; and that, of the amount received for such tickets, the Cape Cod Railroad Company retained the local fare on its own road, and paid the defendants the amount of the fare from Middleborough to New York, and the ticket-seller at Sandwich was appointed by, accounted to, and received all instructions from said Cape Cod Railroad Company.

"The defendants offered evidence, which was uncontradicted, that by their rules, passengers holding tickets to New York were restricted to the steamboat trains; that two steamboat trains were run each afternoon, to one of which cars passing through Middleborough were attached, and stopped at Tiverton; and that the morning train from Boston to Newport was not one of said steamboat trains.

"The plaintiff offered in evidence a conversation between himself and the ticket-seller at Sandwich, to the admission of which the defendants objected, upon the ground that it did not appear that the ticket-seller was their agent. The testimony was admitted as

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follows, namely: The plaintiff asked Achilles Atkins, the ticket-seller, if he could go to Newport on the morning train on that ticket; and he said, yes. The evidence was conflicting, whether or not the plaintiff was informed of the defendants' rule before purchasing his ticket.

"The defendants requested the judge to instruct the jury as follows:

"1. If the jury find that the plaintiff purchased at Sandwich, on the Cape Cod Railroad, a through ticket for New York, in part over the defendants' railroad, such ticket would not entitle the plaintiff to ride in any local train or trains on the defendants' railroad between Middleborough and Newport which the plaintiff might select; but the defendants could designate the time and mode of conveyance on their railroad, provided that the plaintiff was carried, or allowed to go, by the earliest through passenger conveyance, and by direct line to New York; and such ticket would not entitle the plaintiff to break his journey by stopping at one or more points on the defendants' railroad.

"2. The plaintiff, buying a through ticket to New York over the defendants' line of railroad and steamboats connecting therewith, must take the mode of conveyance over the defendants' line provided by their rules and regulations, provided he shall be carried, or allowed to go, by a direct and the earliest through passenger conveyance.

"3. It was competent for the defendants to make rules and regulations to prevent passengers on through tickets from Middleborough to New York, over the defendants' line, from stopping at intermediate points on their railroad, or at Newport; and it is immaterial whether the plaintiff, before purchasing such through ticket, was informed or not of such rules and regulations.

"4. If the defendants ran a through passenger car or train, with proper accommodations, from Middleborough to Newport, connecting there with the earliest steamboat leaving for New York, they might lawfully restrict all through passengers from Middleborough to New York to such car or train, and might lawfully prevent such through passengers from taking other trains.

"5. If there was a difference in the fare between a through conveyance from Middleborough to New York, and a conveyance allowing stops at intermediate points of the journey, the plaintiff, who selected a through conveyance as the cheaper, has no cause of action

against the defendants, if prevented by them from stopping and breaking his journey at any intermediate point.

"6. The Cape Cod Railroad Company, if authorized by custom or contract to sell tickets over the defendants' railroad, would not be authorized thereby to make special contracts for the conveyance of passengers over the defendants' railroad in contravention of the rules and regulations of the defendants, but only in the usual and regular way; and would not be authorized thereby to contract with passengers on through tickets, permitting them to stop or break their journey at intermediate points.

"7. It would not be within the scope of the authority of a ticket-seller appointed by the Cape Cod Railroad Company, authorized by said company to sell tickets over the defendants' railroad, under such custom or contract to make representations binding upon the defendants as to what would or would not be allowed the passenger holding such ticket to do upon the defendants' railroad. He could only sell such tickets subject to the lawful rules and regulations of the defendants.

"8. There is no evidence from which the jury can lawfully infer that the ticket-seller upon the Cape Cod Railroad was an agent of the defendants, authorized to make contracts for the conveyance of passengers over the defendants' railroad, other than by the sale of tickets in the usual way and form, or to make representations as to the trains by which the defendants would carry said passengers; and such contracts and representations, if made, would be binding only on said Cape Cod Railroad Company.

"9. If the jury shall find that, under the terms of connection subsisting, either by express or implied contract, between the Cape Cod Railroad Company and the defendants, said Cape Cod Railroad Company had no right to sell through tickets, or make contracts for conveyance of passengers, allowing the passenger to break his journey or stop on the way, before reaching his destination, the plaintiff's remedy for a breach of such representation or contract, or any injury resulting therefrom, would be against the Cape Cod Railroad Company, and not against the defendants.

"These instructions the judge declined to give in the form requested, but did instruct the jury substantially as follows: That the plaintiff, holding a ticket in the above form, purchased by him of the ticket-seller at Sandwich, upon which no condition appeared, was entitled to ride thereon upon the defendants' regular train that

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morning from Middleborough to Fall River, and from Fall River he was entitled to ride in the next regular train of the defendants from that place to Newport; that the rule alleged to have been made by the defendants was a rule the defendants had a right to make and enforce, and the plaintiff would be bound thereby if he had knowledge thereof; that if the plaintiff, at any time before entering the defendants' cars at Middleborough, had knowledge of said rule, he was not entitled to ride from Middleborough to Fall River on said ticket in any but the steamboat trains; and that if, at any time before entering the defendants' cars at Fall River, the plaintiff had knowledge of said rule, he was not entitled to ride on said ticket from Fall River to Newport in any but the steamboat trains, and, if he attempted so to do, the defendants might lawfully, using no unnecessary force, remove him from any other train; but that, if the jury should find that the plaintiff had not such knowledge before entering the train from Fall River to Newport, and no reasonable means of knowledge, then he was entitled to ride upon said ticket to Newport; that this question of knowledge was the main question for the jury to decide; that, upon this question of the plaintiff's knowledge of the defendants' rule, his conversation with Atkins, the ticket-seller, was competent testimony, and to be considered by the jury; but that, upon the evidence, Atkins was not the defendants' agent, and had no power to make contracts binding upon the defendants, and for this purpose alone, namely, as tending to show whether or not the plaintiff had such knowledge, the evidence of the conversation was admitted, and ruled out for all other purposes.

"The jury found for the plaintiff, with damages in the sum of \$563; and to the foregoing rulings and refusals to rule the defendants allege exceptions."

C. F. Choate, for defendants. 1. The chief point in which the instructions given to the jury differ from those asked for by the defendants consists in this, that they were instructed that the plaintiff was not affected by a reasonable regulation of the defendants unless he had knowledge of it before entering the cars at Fall River. The qualification was erroneous. If the regulation was reasonable, the plaintiff, whenever informed, was bound to observe it. He suffered no detriment by failing to learn it before he entered the cars at Fall River. Had he learned it before he entered those cars, he might

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have waited for the steamboat train, or have paid additional fare, at his option. When informed, he had the same option, and had no longer a right to ride in the train without paying the established fare. *State v. Overton*, 4 Zab. 435; *Cheney v. Boston & Maine Railroad*, 11 Metc. 121.

2. The conversation with Atkins was improperly admitted. Although the whole testimony is not reported, it is clear, from the ruling of the court upon the whole evidence, that Atkins was not the defendants' agent. The plaintiff's testimony of his conversation with a third person, in no way connected with the defendants, had no tendency to prove his knowledge, or want of knowledge, as to the subject-matter of the conversation.

A. Jones, for plaintiff.

WELLS, J. The plaintiff's ticket entitled him to a passage upon any regular train for passengers upon the road of the defendants. It contained no notice of any restriction or limitation of the right which it purported to give. It was issued by the ticket agent of the Cape Cod Railroad Company, whose authority for that purpose was sufficiently shown by the fact that such tickets had been so issued by said company "for some months prior" thereto, "with the assent of the defendants." The defendants could not, by any rule or regulation not previously made known, restrict the plaintiff from taking the passage to which his ticket entitled him, in any regular train for the accommodation of passengers. Under the instructions, the jury must have found that there was no such information to the plaintiff personally; and the case shows no such publication of the rule as would affect him with notice thereof.

The evidence of the inquiry made by the plaintiff of the person from whom he purchased his ticket, "if he could go to Newport on the morning train on that ticket," and the answer that he could do so, was restricted explicitly by the judge at the trial, to the question whether the plaintiff had previous knowledge of the rule in question.

We think that the defendants show no good ground of exception to the ruling or the instructions to the jury in the court below.

Exceptions overruled.

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BRYANT, plaintiff, v. RICH *et al.*

(100 Mass. 180.)

Master and servant — Liability of carrier by steamboat for acts of servants — Removal of cause from State to United States courts.

Plaintiff was a passenger on the steamboat of defendants, common carriers, when the steward and some of the table waiters wrongfully assaulted and injured him. *Held*, that defendants were liable.

An action had been prosecuted to judgment in a State court, the verdict had not been set aside, the exceptions taken at the trial had been overruled by the court of last resort, and the only question remaining for disposal was upon a motion for new trial on the ground of excessive damages in the verdict. *Held*, that it was too late to obtain a removal of the cause to the United States circuit court, under act of congress of 1867, ch. 196. (*See note*, p. 316.)

ACTION in tort by plaintiff against the owners of the steamboat Eastern Queen, for injuries received by him while a passenger on the steamboat going from Boston to Gardiner, Me. Three of the defendants were citizens of Maine, and the other five, defendants and the plaintiff, were citizens of Massachusetts. The opinion sufficiently states the case. The verdict was for plaintiff in the sum of \$8,000. Defendants alleged exceptions.

T. H. Sweetser & R. M. Morse, Jr. (C. P. Greenough with them), for defendants.

C. R. Train & J. Q. A. Brackett, for plaintiff.

CHAPMAN, C. J. The defendants were carriers of passengers upon their steamboat, and the plaintiff was a passenger paying fare and having the ordinary rights of passengers. The steward and some of the table waiters wrongfully knocked him down and maltreated him.

The case thus presented differs in one respect from that of *Howe v. Newmarch*, 12 Allen, 49, for, in that case, the plaintiff was a stranger both to the master and the servant. But here the plaintiff is entitled to all the rights which he derived from the contract of the defendants as carriers. The implied contract differs in some

respects from that of carriers of goods. So far as this case is concerned, we have only to consider what it is in respect to the conduct of their servants. Nor do we deem it necessary to consider what it is in regard to selecting suitable persons as servants, or in regard to retaining incompetent servants after notice of their incompetency; for there is nothing in the bill of exceptions tending to show that they were in fault in this respect. We shall consider the matter on the assumption that they had not been negligent in selecting or retaining their servants.

As a general rule, the master is liable for what his servant does in the course of his employment; but, in regard to matters wholly disconnected from the service to be rendered, the master is under no responsibility for what the servant does or neglects to do. The reason is that, in respect to such matters, he is not a servant. *Aldrich v. The Boston & Worcester Railroad Co.*, 100 Mass. 31. If, therefore, any of the officers or men, connected with the running of the defendants' boat, had met the plaintiff in the street or elsewhere, in a position wholly disconnected with their duties to the defendants, and committed an assault and battery upon him, it is clear that the defendants would not have been liable.

There are two views which may be taken in the present case. One is the view which was taken by the court in *Philadelphia & Reading Railroad Co. v. Derby*, 14 How. 468. The plaintiff in that action was riding gratuitously, and the court held that the company were liable to him, not on the ground of a contract between the parties, but because he was injured by their carelessness when he was where he had a lawful right to be. But as the plaintiff in this case was a passenger for hire, we think it better to consider what the contract was between them. This has been discussed in the following cases: *Chamberlain v. Chandler*, 3 Mason, 242; *Nieto v. Clark*, 1 Clif. 145; *Baltimore & Ohio Railroad Co. v. Blocher*, 27 Md. 277; *Pittsburg, Fort Wayne & Chicago Railroad Co. v. Hinds*, 53 Penn. St. 512; *Simmons v. New Bedford, Vineyard & Nantucket Steamboat Co.*, 97 Mass. 361, and 100 id. 34; *Milwaukee & Mississippi Railroad Co. v. Kinney*, 10 Wis. 388. It has also been thoroughly discussed in *Goddard v. Grand Trunk Railway*, 57 Me. 202; 2 Am. R. 39. These cases were cited by CLIFFORD, J., in *Fendleton v. Kinsley*, Rhode Island circuit, June, 1870, not yet reported, and the terms of the contract for carriage by water are well stated by him in conformity with the authorities, as follows: "Passengers do

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not contract merely for shiproom and transportation from one place to another; but they also contract for good treatment, and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance." In respect to such treatment of passengers, not merely the officers, but the crew, are the agents of the carriers. In *Chamberlain v. Chandler*, 3 Mason, 242, cited above, STORY, J., says: That kindness and decency of demeanor is a duty not limited to the officers, but extends to the crew.

The interpretation of the contract of the carrier, which is given in the cases above cited, is not unreasonable. It is not more extensive than the necessities of passengers require. Nor is it difficult to perform. The cases in which it is violated by servants, even of the lowest grade, on board a ship or engaged in the management of a railroad train, and the carrier rather than the passenger ought to take the risk of such exceptional cases, the passenger being necessarily placed so much within the power of the servants.

In this case, the servants who committed the wrong, being the steward and table waiters, were those who were engaged in providing meals, waiting on the tables and collecting the pay for meals. They were treating the plaintiff's relative with gross rudeness in connection with this business, and the plaintiff interfered only by a remark that was proper, whereupon the assault was committed. It was not as if a quarrel had occurred on shore and disconnected with the duties of persons on shipboard. It violated the contract of the defendants, as to how the plaintiff should be treated by their servants, who were employed on board the ship and during the passage. For a violation of such a contract either by force or negligence, the plaintiff may bring an action of tort, or an action of contract.

There were many prayers for instructions, and many instructions were given to the jury in application to the various aspects of the case; but in our view many of them were immaterial. Some of them were too favorable to the defendants, and only one of them could have been injurious to them.

In answer to a request from a juror, as to what was the scope of the respective duties of the employees on the steamer, the court replied, in substance, that the jury must exercise their own judgment—that it must depend on circumstances—there could be no law in the matter, and the jury were to use their own judgment. A correct answer would have been, to state the contract which the

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carriers had made, and instruct the jury that each of the hands employed on board the ship was bound to do faithfully the duty assigned to him in the performance of this contract, and not one of them was at liberty to do an act in violation of it, and, if he did so, the defendants were liable. But there is nothing in the bill of exceptions to show that it applied to any matter that is material; for the instructions already given had stated the liability of the defendants too narrowly.

Exceptions overruled.

After this decision, the defendants moved the superior court to set aside the verdict and grant a new trial on the ground that the damages were excessive. Before a hearing was had on this motion, those of the defendants who were citizens of Maine made and filed, in accordance with the United States Statutes of 1867, ch. 196 (14 United States Statutes at Large, 558), an affidavit and a petition for the removal of the suit to the next circuit court of the United States to be held in this district. The plaintiff objected to such a removal, on the ground that the petition was filed too late, and PITMAN, J., on that ground declined to grant it; and the defendants alleged exceptions, which were argued in November, 1871.

Morse, Sweetser with him, for defendants.

Brackett, Train with him, for plaintiff.

GRAY, J. The objections to the granting of the petition for the removal of this case into the circuit court of the United States under the act of congress of 1867, chapter 196, are manifold.

The act of congress provides that any suit in a State court, "in which there is a controversy between the citizen of the State in which the suit is brought and a citizen of another State," and the matter in dispute exceeds the sum of \$500, exclusive of costs, may be removed into the circuit court of the United States upon a petition, filed in the State court "at any time before the final hearing or trial of the suit," by "such citizen of another State, whether he be plaintiff or defendant," accompanied by his affidavit "that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court," and by an offer of sufficient surety for the entry of the case and

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copies of the papers therein in the federal court; and "it shall be thereupon the duty of the State court to accept the surety and proceed no further in the suit," and, the copies having been entered in the United States court, "the suit shall then proceed in the same manner as if it had been brought there by original process."

1. The petition in this case is filed by three only out of nine defendants. We have much doubt whether, when the party in whose behalf the petition is filed consists of several persons, the petition can be supported unless all of them join therein. The construction uniformly put upon the similar provision in the judiciary act of 1789, chapter 20, section 12, has been that all must join in the petition for removal. *Ward v. Arredondo*, 1 Paine, 410; *Beardsley v. Torrey*, 4 Wash. C. C. 286; *Smith v. Rines*, 2 Sumn. 338; *Ex parte Girard*, 3 Wallace, Jr., 263.

2. This is an action of tort, which may be maintained against all or any of the wrong-doers, jointly or severally. If it should be deemed to have been duly removed into the federal court, so far as the petitioners for such removal are concerned, no reason has been shown why it should not proceed in the State courts as against those defendants who do not seek to remove it into another jurisdiction, and who are themselves each liable for the entire damages which may be finally recovered. *Smith v. Rines*, above cited.

3. Five of the nine defendants in this case, as well as the plaintiff, are citizens of this commonwealth; and the courts of the United States are not authorized by the constitution to take jurisdiction, so far as it depends upon the citizenship of the parties, of suits between citizens of the same State, but only of suits between citizens of different States, or between a citizen and an alien, and can therefore have no jurisdiction (except when it grows out of the subject-matter) of an action in which any of the plaintiffs and of the defendants, who are real parties in interest, by or against whom relief is sought, are citizens of the same State. Const. of U. S., art. 3, § 2; *Strawbridge v. Curtiss*, 3 Cranch, 267; *New Orleans v. Winter*, 1 Wheat. 91; *Wood v. Davis*, 18 How. 467; *Tuckerman v. Bigelow*, 21 Law. Rep. 207; *Wilson v. Blodget*, 4 McL. 363, cases already cited.

4. The words "before final hearing or trial," in the act of congress of 1867, would seem to be equivalent in meaning to the same words "trial or final hearing," as transposed in the similar act of 1866, ch. 288; and it is at least doubtful whether a party, who has

once taken the chance of a decision upon the merits by a trial before the jury, in an action at law, or a hearing before a court in a suit in equity, in the State court can, even if the case stands open for a new trial or further hearing, remove it into another tribunal. It has been decided by the supreme court of Wisconsin, in a very able judgment, that he could not. *Akerly v. Vilas*, 24 Wis. 165; 1 Am. R. 166. There have been decisions of single judges of the federal courts within the same circuit to the contrary. S. C., Abb. (U. S.) 284; *Johnson v. Monell*, Woolw. 390. It cannot, therefore, be deemed to be authoritatively settled whether a case can be removed into the courts of the United States after one verdict has been returned and set aside in the State court. And it is not necessary for us now to decide that question.

5. In the present case, the verdict has not been set aside, the exceptions taken at the trial have been overruled by this court, and the only question remaining to be disposed of is upon the motion for a new trial, on the ground that the damages found by the jury were excessive. The seventh article of amendment of the constitution of the United States declares, that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." It was long ago decided by this court, and, more recently, by the supreme court of the United States, that an act of congress providing for the removal of an action into the courts of the United States for trial, after verdict and judgment in a State court, was a violation of this article of the constitution. *Wetherbee v. Johnson*, 14 Mass. 412; *Parsons v. Bedford*, 3 Pet. 433; *Justices v. Murray*, 9 Wall. 274. The reasons given for those decisions are equally applicable to a case in which a verdict has been rendered, and has not been set aside, and no question of law remains open; for, by the rules of the common law, facts once tried by a jury cannot be re-examined, except by a motion for a new trial, and that motion can only be granted by the court which ordered the trial, and before which it was had. 14 Mass. 420; 3 Pet. 448; 9 Wall. 277, 278. The act of congress cannot, therefore, be construed to authorize this action to be removed into the circuit court of the United States, at the present stage, and the superior court rightly ruled that the petition for removal was filed too late.

Exceptions overruled.

NOTE. — 1. See *Passenger R. R. Co. v. Young*, ante, p. 78, and *Sherley v. Billings*, post, wherein substantially the same doctrine is held as to the liability of masters for the acts of their servants.

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The question was very fully discussed in *Goddard v. Grand Trunk Railway*, 2 Am. R. 39; 57 Me. 203, and it was therein held that passenger carriers are responsible for any misconduct of their servants, either negligent or willful, in the course of their employment. It was said in that case, the carrier "must not only protect his passengers against the violence and insults of strangers and co-passengers, but a *fortiori* against the violence and insults of his own servants. If this duty to the passenger is not performed; if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the willful misconduct of the carrier's servants, the carrier is necessarily responsible." And this was cited with approval in *Sherley v. Billings*.

In the recent case of *Bayley v. Manchester, Sheffield & Lincolnshire Railway*, L. R., 7 C. P. 415; 3 Eng. R. 308 (1873), the plaintiff, a passenger on defendant's line of railway, sustained injuries in consequence of being violently pulled out of a railway carriage by one of the defendant's porters, who acted under an erroneous impression that the plaintiff was in the wrong carriage. The defendant's by-laws did not expressly authorize the company's servants to remove any person being in a wrong carriage, but they provided that no person should be allowed to enter any carriage or to travel therein without first having paid his fare and taken a ticket. They likewise provided that the porters should act under the orders of the station-master, etc., and do all in their power to promote the comfort of the passengers and the interest of the company. Held, by the court of common pleas, that the act of the porter in pulling the plaintiff out of the carriage was an act done within the course of his employment as the defendant's servant, and one for which they were, therefore, responsible. See, also, *The Thetis*, L. R., 2 A. & E. 365, wherein are collected the authorities.

In *Ramsden v. Boston & Albany R. R. Co.*, 6 Am. R. 200; 104 Mass. 117, the conductor attempted to seize articles of property in the hands of a passenger for the purpose of enforcing payment of fare, and the corporation was held liable to an action for assault and battery. But see cases cited by appellant's counsel in *Higgins v. The Watervliet R. R. Co.*, 7 Am. R. 203. In that case it was held that a railroad company was liable for injuries occasioned by the unlawful act of his servant done under a mistake of facts, or a mistake of judgment upon the facts. See, also, *Jackson v. The Second Avenue R. R. Co.*, 7 Am. R. 443.

In *Isaacs v. The Third Avenue R. R. Co.*, 7 Am. R. 418 (47 N. Y. 122), the court of appeals held that defendants were not liable for injuries occasioned by their conductor's pushing a passenger, who desired to alight, from the car while it was in motion. This decision was put upon the ground that the act was not done in the line of duty, and within the scope of the authority conferred by the master. But the same court has held that it was the duty of conductors of street cars to assist persons to get on and off the car. *Drew v. Sixth Avenue R. R. Co.*, 3 Keyes, 429. In *Holmes v. Wakefield*, 13 Allen, 560, it was decided that a railroad company was liable for an injury occasioned by the conductor's compelling a passenger to jump from a train while in motion. See, also, *Sanford v. Eighth Avenue R. R. Co.*, 23 N. Y. 343. In *Duggins v. Watson*, 15 Ark. 113, it was held that the defendants were liable for a collision occasioned by the willful acts of their servants "in the course of their employment." But see *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479. See *Little Miami R. R. Co. v. Wetmore*, 2 Am. R. 373.

2. On the question of transfer of causes to the United States courts, see note to *Morton v. Mutual Life Insurance Co.*, 7 Am. R. 507. — RHP.

SHIPLEY, plaintiff, v. FIFTY ASSOCIATES.

(106 Mass. 194.)

Highway — injury to traveler by falling of ice and snow from building.

The owner of a building so near the street, and of such shape and character that snow and ice collected upon the roof, in the natural course of things, falls down upon the sidewalk, and thereby injures a passer using due care, is liable for the injury; and this is so, notwithstanding the rooms in the building are occupied by tenants, he having access to and control of the roof.

ACTION in tort, for injuries resulting to plaintiff while walking on the sidewalk of a street in the city of Boston, using due care; occasioned by snow and ice falling upon her from defendants' building. The opinion sufficiently states the case. The verdict was for plaintiff. Defendants alleged exception.

C. A. Welch, for defendants.

J. D. Ball and *J. P. Treadwell*, for plaintiff.

AMES, J. At the trial, the defendants, although they were permitted to show what precautions they had taken to guard against the accident, contented themselves with offering to prove that their building was as safe as any other in the city, in respect to passengers; that buildings with roofs like theirs were the only kind in use until within ten years past; and that, in this case, no precaution could have been taken more than was taken in fact. Their defense proceeds upon the ground that the damage to the plaintiff was the result of an inevitable accident; that travelers in the streets in cities, in this climate, take the risk of such accidents upon themselves, as they do the danger of injury from runaway horses, or from the slippery or crowded condition of the streets; and that the defendants cannot be said to be to blame, or to be responsible, unless it can be shown that their building was of an unusual or improper construction, or that they neglected to take proper precautions in its care and management. In other words, they claim the right to erect or maintain a building, provided it be of no unusual construction, so near to the street, and of such a shape and character that

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snow and ice collected upon the roof must inevitably, and in the natural course of things, be liable to slide down and fall upon the sidewalk, thereby exposing foot passengers to the risk of great bodily injury. Does the law give them any such right? It will not be contended that they would have a right, purposely to throw the snow or ice from the roof into the street, at the risk of passengers, and without warning or precaution of any kind. Have they the right so to construct their building that the roof, in consequence of alternate freezing and thawing, and under the influence of natural laws, will, in a like sudden and dangerous manner, pour down an avalanche upon the sidewalk at the risk of the passing crowd?

The plaintiff, at the time of the accident, was were she had a right to be, and was not guilty of any want of due and reasonable care. For the purpose for which she was using the sidewalk, her rights were exactly the same as if she owned the soil in fee simple. The case, in our judgment, depends on the same rules, and is to be decided on the same principles, as if it raised a question between adjoining proprietors, in which the lands or buildings of one were injured by the manner in which the other had seen fit to occupy or use his own land and buildings. In contemplation of law, the person is at least as much entitled to protection as the estate. The right to discharge snow and ice from one's own house upon the person of the next door neighbor is, certainly, no better or stronger than the right to subject that neighbor's building or land to the same kind of inconvenience. *Shipley v. Fifty Associates*, 101 Mass. 251 (3 Am. R. 346). It is well settled that, although every land-owner has a right to use his own land for any lawful purpose for which, in the natural course of enjoyment, it can be used, yet he cannot use his neighbor's land, except upon proof of express grant or permission, or prescription which furnishes a presumption of a grant. Water naturally collecting on the surface of his land, and naturally passing off upon the land of his neighbor, would not injure the latter in such a sense as to give him a remedy by action. But if the land-owner, "not stopping at the natural use of his close," to use the language of Lord CARRNS in *Rylands v. Fletcher*, Law Rep., 3 H. L. 330, 339, "had desired to use it for any purpose which I may term a non-natural use," the case would stand on very different ground. It has been settled that no one has a right, by an artificial structure of any kind upon his own land, to cause the water which collects thereon in rain or snow to

be discharged upon his neighbor's land, either in a current or stream, or in drops. *Martin v. Simpson*, 6 Allen, 102. If the defendants had constructed a reservoir in their attic, to be filled by the rain, they would clearly be liable for damage occasioned to their neighbor by the breaking down of such a reservoir. It can, of course, make no difference that the rain comes in the form of snow, and is lodged on the outside of the roof; in either case it is collected by an artificial structure, for the convenience of one party, without the concurrence of the other. In the case already cited, at an earlier stage (*Fletcher v. Rylands*, Law Rep., 1 Ex. 265), Mr. Justice BLACKBURN, in giving the judgment, which was afterward affirmed in the house of lords, expresses himself substantially thus: Whoever, for his own purposes, brings on his land, and collects and keeps there any thing likely to do mischief if it escapes, must keep it in at his peril. He illustrates this proposition by putting various cases in which a party is damnified without any fault of his own, and in which he declares it to be reasonable and just that the neighbor, who has brought something on his own property not naturally there, harmless so long as it is confined to his own property, but which he knows will be mischievous if it should get upon his neighbor's land, should be held responsible to make good all damages, if he should not succeed in confining it to his own property. The case of *Fletcher v. Rylands* was one in which the defendant had constructed a reservoir upon his own ground, which gave way and inundated the plaintiff's mine.

In the case at bar, it was convenient to the defendants to place their building on the line of the street, and to have their roof so constructed that the snow, which would be harmless if allowed to reach the ground as it falls from the clouds, is intercepted and lodged upon the roof, at a great height above the heads of passengers. In the case of a building so situated and so constructed, it is a matter substantially certain and inevitable that there will be occasions, and, perhaps, frequent occasions, in the winter season, when, with the alternations of the weather common in this climate, the accumulation upon the roof may become very great, so as to come down suddenly upon the sidewalk in a very dangerous manner. Accidents, from such causes, are well known to be frequent, and, as we understand the defense, could not be prevented by any amount of care or diligence under the circumstances of the present case. It is well settled, however, that no man has a right so to construct his

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roof as to discharge upon his neighbor's land water which would not naturally fall there. Washburne on Easements, 390; *Reynolds v. Clarke*, 2 Ld. Raym. 1899; *Martin v. Simpson*, 6 Allen, 102. In such a case, the maxim, *sic utere tuo ut alienum non laedas*, would be applicable. It is not at all a question of reasonable care and diligence in the management of his roof, and it would be of no avail to the party to show that the building was of the usual construction, and that the inconvenience complained of was one which, with such a roof as his, nothing could prevent or guard against. He has no right so to construct his building that it will inevitably, at certain seasons of the year, and with more or less frequency, subject his neighbor to that kind of inconvenience; and no other proof of negligence on his part is needed. *Ball v. Nye*, 99 Mass. 582. He must, at his peril, keep the ice or the snow that collects upon his own roof, within his own limits; and is responsible for all damages, if the shape of his roof is such as to throw them upon his neighbor's land, in the same manner as he would be if he threw them there himself. He has no right to appropriate his neighbor's land in that manner, for his own convenience, as a place into which he may pour the accumulated snow from his own premises.

It appears to us, therefore, that the defendants have no right to erect or maintain a building so near to the street, and with a roof of such a construction that, notwithstanding all the care that can be taken, passengers upon the sidewalk shall be subjected to the kind of injury complained of in this case. This would be an appropriation of the sidewalk, or an application of it to their own convenience, at the risk of the traveler, and without regard to public right, which they cannot lawfully make. No man would claim for them the right to collect, in one stream, the rain that falls upon their roof, and pour it by means of a spout upon the street below. They have no better right to collect and retain the snow till it falls by its own weight. In either case, it would be an attempt to extend their right as proprietors beyond the limits of their own property, and to secure an advantage that does not belong to them, at the expense of their neighbor, or of the traveler, whose rights for this special purpose are as complete as those of an adjoining proprietor.

With regard to the only remaining point taken by the defendants, that the liability, if any, is upon the tenants and occupants, and not upon the defendants, who are the landlords, we must consider that objection as substantially disposed of by our previous decision

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in this same case. 101 Mass. 251. The building was occupied by separate tenants, one of whom had some special facilities for getting upon the roof, but it does not appear that the place where the snow and ice accumulated was under the control of the tenants, or that they had any thing to do with the outside of the roof. They, certainly, were in no sense responsible for damages not occasioned by any neglect of duty on their part, but resulting wholly from the shape of the roof, and from the proximity of the building to the street. Their responsibility is confined to the premises which they respectively and exclusively occupied as tenants. The landlords were not excluded from going upon the roof, and so altering its construction that at all seasons of the year it should not produce any inconvenience or danger to travelers on the highway below.

The rulings at the trial appear to us to have been correct; and, according to the terms of the reservation, there will be

Judgment for the plaintiff upon the verdict.

ROYCE, plaintiff, v. GUGGENHEIM.

(106 Mass. 201.)

Landlord and tenant — eviction.

A landlord erected, without the tenant's consent, a new building in the back yard, against the demised house, whereby two of the rooms, previously used as kitchen and bedroom, were made unfit for those purposes, and were, by reason of that unfitness, abandoned by the tenant. *Held* an eviction, so as to effect a suspension of the rent.

ACTION on contract for rent from March 7 to April 7, 1869, of premises leased by plaintiff to defendant. The lease was for three years, and contained no express covenant by the landlord.

At the trial in the superior court, before ROCKWELL, J., the defendant relied on his eviction from the premises, in defense against the action; and the plaintiff requested a ruling "that, in order to constitute an eviction, whether of a part or of the whole of said premises, it must be as if closed up actual and entire, there being evidence of some use of the alleged evicted rooms." The

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judge declined so to rule, but instructed the jury "that if the plaintiff, before the month for which rent was sought to be recovered, had evicted the defendant from two or more of the rooms, he cannot recover for that month's rent; that, if the rooms, at the time of the lease and for some time after, had light and air enough to make them fit for use as kitchen and sleeping-chamber, and were thus used, and if, after the erection by the plaintiff of the new building in the back yard, against the house, closing the windows of those rooms, those rooms were made entirely unfit for those purposes, and by reason of that unfitness were abandoned, and this erection was not by the license or consent of the defendant, this was an eviction so as to effect a suspension of the rent, and it was not essential to such eviction that the doors of the room should have been closed up by the plaintiff so as to prevent the defendant's entry into the same." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

H. H. Mather, for plaintiff.

J. L. Eldridge, for defendant.

GRAY, J. The eviction of a tenant from the demised premises, either by the landlord or by title paramount, is a bar to any demand for rent, because it deprives him of the whole consideration for which rent was to be paid. *Gilbert on Rents*, 145; *Morse v. Goddard*, 13 Metc. 177. And his eviction by the landlord from part of the premises suspends the entire rent, because the landlord "shall not so apportion his own wrong as to enforce the lessee to pay any thing for the residue." *HALE*, C. J., in *Hodgkins v. Robson*, 1 Ventr. 276, 277; *Page v. Parr*, Style, 432; *Shumway v. Collins*, 6 Gray, 227; *Leishman v. White*, 1 Allen, 489.

To constitute an eviction, which will operate as a suspension of rent, it is not necessary that there should be an actual physical expulsion of the tenant from any part of the premises. Any act of a permanent character, done by the landlord, or by his procurement, with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or of a part thereof, to which he yields and abandons possession, may be treated as an eviction. *Smith v. Raleigh*, 3 Camp. 513; *Upton v. Townsend*, 17 C. B. 30.

But no lawful act, done by the landlord upon an adjoining estate owned by him, for the purpose of improving that estate, and not

for the purpose of depriving the tenant of the enjoyment of any part of the demised premises, can be deemed an eviction. The mere fact that, by an act or default of the landlord, not unlawful in itself, nor accompanied with any intention to affect the enjoyment of the premises demised, they have been rendered uninhabitable, is not sufficient. It is now well settled, both here and in England, that in a lease of a building for a dwelling-house or store, no covenant is implied that it should be fit for occupation. *Hart v. Windsor*, 12 Mees. & Welsb. 68; *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, id. 242; *Welles v. Castles*, 3 Gray, 323. And the English authorities, ancient and modern, are conclusive, that even where the landlord is bound by custom or express covenant to repair, and by his failure to do so, the premises become uninhabitable, or unfit for the purposes for which they were leased, the tenant has no right to quit the premises, or to refuse to pay rent according to his covenant, but his only remedy is by action for damages. 14 Hen. IV, 27, pl. 35; 27 Hen. VI, 10, pl. 6; Bro. Ab. Dette, 18, 72; PARKE, B., in 12 Mees. & Welsb. 84; *Surplice v. Farnsworth*, 7 Man. & Gr. 576; *Kramer v. Cook*, 7 Gray, 550; *Leavitt v. Fletcher*, 10 Allen, 119, 121.

In the recent English case of *Upton v. Townsend*, 17 C. B. 30, after elaborate arguments upon the question, all the judges substantially agreed upon the definition of eviction. Chief Justice JERVIS said: "I think it may now be taken to mean this: not a mere trespass and nothing more, but something of a grave and permanent character, done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." Mr. Justice WILLIAMS said: "There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises, which do not amount to an eviction, but which may be either mere acts of trespass or eviction, according to the intention with which they are done. If these acts amount to a clear indication of intention on the landlord's part, that the tenant shall no longer continue to hold the premises, they would constitute an eviction." Mr. Justice CROWDER said: "Eviction, properly so called, is a wrongful act of the landlord, which operates the expulsion or amotion of the tenant from the land. The question here is, whether there has been an eviction, as it is popularly called, a putting out or depriving the tenants of the subject-matter of the demise." And Mr. Justice WILLES said: "If the plaintiff is liable for what has been done, does it amount to an eviction? I am of

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opinion that it does, as being an act of a permanent character, done by the landlord in order to deprive, and which had the effect of depriving the tenant of the use of the thing demised, or of a part of it." The act of the landlord which was there held, upon a statement authorizing the court to draw such inferences as a jury might, to amount to an eviction, was the rebuilding of the tenements upon their destruction by fire (which the lessor had covenanted to do), in such a manner as permanently to alter the character of the demised premises.

In a still later case, where the tenant, being desirous to underlet, put in a man to show the rooms, and posted in the window a bill stating that they were to be let; and the landlord, being annoyed by this proceeding, and by the conduct of the man, turned him out of the house and took down the bill, but left the keys in the rooms; and the tenant did not return, and contended that he had been evicted, and therefore was not liable for the rent; it was ruled at nisi prius, and affirmed by the court of queen's bench upon a motion for a new trial, that it was a question for the jury, whether the act of the landlord was done with the intention of evicting the tenant, or simply for the purpose of expelling the man whom he had put in; and, the verdict being for the landlord, the court refused to set it aside. *Henderson v. Mears*, 1 Fost. & Finl. 636; S. C., 28 L. J. N. S., Q. B., 305; 5 Jur. N. S. 709; 7 Week. 554.

It was argued for the defendant, in the present case, that even the erection of a building by the landlord upon adjoining land would be an eviction, if it stopped the tenant's windows; and his counsel cited *Dyett v. Pendleton*, 8 Cow. 727, in which the New York court of errors held that the creation of a nuisance by the landlord in another tenement under the same roof, by bringing lewd women into it, who made a great noise and disturbance there at night, in consequence of which the lessee and his family left the demised premises, was evidence to go to the jury under a plea of eviction. Upon that case, it is to be observed, 1st. The act of the landlord was an unlawful act, and not a lawful use of his other tenement; 2d. The decision of the court of errors was not that the facts in law amounted to an eviction, but only that they should have been submitted to the jury; 3d. That decision reversed the unanimous judgment of the supreme court, as reported in 4 Cow. 581; 4th. It has since been considered, even in New York, an extreme case. SAVAGE, C. J., in *Etheridge v. Osborn*, 12 Wend. 529-532; NELSON, C. J., *Ogilvie v. Hull*, 5 Hill, 52, 54:

BRONSON, C. J., in *Gilhooley v. Washington*, 4 Const. 217, 219. In *Palmer v. Wetmore*, 2 Sandf. 316, the superior court of the city of New York, consisting of Chief Justice OAKLEY and Justices VANDERPOOL and SANFORD, adjudged that the mere fact of the erection of a building by a landlord on his adjoining land, so as to obstruct and darken the tenant's windows, was not an eviction. To the same effect is *Myers v. Gemmel*, 10 Barb. 537. See, also, the learned opinion of Judge DALY, in *Edgerton v. Page*, 1 Hilt. 320; S. C., 20 N. Y. 281. We cannot, therefore, rest our judgment in the case at bar upon that of *Dyett v. Pendleton*. Nor is it necessary so to do.

The lease from the plaintiff to the defendant was of a house and shop, and contained no express covenant on the part of the landlord. By the law of this commonwealth, no easement of light and air exists over adjoining lands, unless by express grant or covenant. *Collier v. Pierce*, 7 Gray, 18; *Rogers v. Sawin*, 10 id. 376; *Brooks v. Reynolds*, ante, 31. If the plaintiff had conveyed away the adjoining estate, the grantee might have built thereon so as to stop up the defendant's windows, without affording the latter any right of action for damages, or of suspension or abatement of his rent. And so, if the landlord himself erected a building upon any part of the adjoining estate, for the purpose of improving that estate, it was a lawful act, which violated no obligation which he was under to the defendant, and did not constitute an eviction. If, on the other hand, such an act was done by the landlord for the purpose and with the effect of making the defendant's tenement, or any room therein, uninhabitable, the defendant might, perhaps, at his election, treat it as an eviction, and give up the premises and refuse to pay rent. At any rate he might do so, if the building was erected upon part of the curtilage included in his lease, closing the windows of his dwelling-house, so as to make a part of it uninhabitable; because that would be the erection of a permanent structure on part of the demised premises, materially changing the character and beneficial enjoyment thereof; and, in such case, the landlord would be responsible for the effect of his wrongful act, without further proof of unlawful intent. *Upton v. Townsend*, 17 C. B. 30, above cited.

Applying these principles to the bill of exceptions, we are of opinion that the plaintiff fails to show that he was aggrieved by the instructions given at the trial. Under those instructions, the jury must have found that, by the plaintiff's erection of a new building in the back yard against the house, without the tenant's consent,

Randall v. Eastern Railroad Co.

two of the rooms therein, previously used as a kitchen and bedroom, were made entirely unfit for those purposes, and by reason of that unfitness were abandoned. The bill of exceptions does not show that the plaintiff contended that the rooms could have been used for any other purpose after the erection of the new building, or that the back yard was not part of the demised premises, or made any question, or asked for any ruling, as to the intention with which he erected that building.

Exceptions overruled.

RANDALL AND WIFE, plaintiffs, v. EASTERN RAILROAD CO.

(106 Mass. 376.)

Municipal corporations — duty to light streets at night.

Cities and towns are under no obligation to light highways at night.

ACTION in tort, to recover for personal injuries received by the female plaintiff, occasioned by falling off a bridge in a highway in Charlestown. The bridge crossed the railroad of defendants, who were bound to keep the bridge in repair.

At the trial in this court, before COLT, J., it appeared that the night of the accident was very dark, and there was no light of any kind in the neighborhood of the place of the accident. The defendants requested the judge to instruct the jury, "that the plaintiffs must show that the accident was caused solely by the failure of the defendants to keep the bridge in proper repair, so as to be safe; that, unless the jury found that such failure was the sole cause of the accident, without any contributory negligence on the part of the female plaintiff, or any other person or corporation, the plaintiffs could not recover; and that if the city of Charlestown was negligent in failing to maintain proper lights at or near the bridge, and such negligence contributed to the accident, so that the jury could say that, but for such negligence, the accident would not have happened, then the plaintiffs could not recover, even if the jury found that the defendants were negligent, and that the female plaintiff used due care." The judge declined so to instruct the jury; and,

instead thereof, instructed them "that the defendants would be liable if, as between them and the plaintiffs, they were solely at fault; that, if the jury found that the female plaintiff was in the exercise of ordinary care, and the defendants had negligently failed to maintain proper protection to travelers, at the place of the accident, and the injury was caused solely by such failure, as between them and the plaintiffs, the negligence of any other person or corporation, not a party to the suit, and not imputable to the female plaintiff, contributing to the accident, would not prevent the plaintiffs from being entitled to a verdict, or constitute a defense; and that the fact, that there was or was not a light near the bridge, was important, as affecting the question whether the female plaintiff was in the exercise of due care." The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

S. B. Ives, Jr., for defendants.

T. H. Sweetser (*W. S. Gardner* with him), for plaintiffs.

GRAY, J. The exception taken in this case is founded solely upon the alleged negligence of the city of Charlestown to provide proper lights at the place in question. But cities and towns are under no obligation to light highways. *Sparhawk v. Salem*, 1 Allen, 30; *Macomber v. Taunton*, 100 Mass. 255. It does not, therefore, appear that there was any evidence that the negligence of the city of Charlestown, or of any other corporation or person than the defendants, contributed to the accident. The question sought to be presented by defendants' requests for instructions does not appear to have arisen in the case, and the defendants show no ground of exception to the instructions given, as applied to the case on trial.

Exceptions overruled.

O'Brien v. Barry.

O'BRIEN AND WIFE, plaintiffs, v. BARRY.

(106 Mass. 300.)

Malicious prosecution.

A husband and wife commenced an action for a malicious replevin of his household furniture, alleging that the replevin suit was commenced with intent to injure the wife, and actually resulted in her injury by the removal of the furniture. It appeared that the replevin suit was still pending. *Held*, that the action could not be maintained.

ACTION in tort by John O'Brien and wife against Michael M. Barry. The opinion states the case. Verdict for defendants. Plaintiffs alleged exceptions.

W. W. Warren, for plaintiffs.

T. H. Sweetser and N. C. Berry, for defendants.

MORTON, J. At the trial, the plaintiffs offered to prove, in substance, the following facts: That the defendant maliciously and without probable cause, having no title to the goods replevied, sued out a writ of replevin against the male plaintiff, and caused the officer to replevy and remove the furniture of the plaintiffs; that he did this for the purpose of injuring the female plaintiff; and that she was thereby greatly injured. It was admitted that the replevin suit was pending at the time this action was commenced. The question is, whether, upon these facts, if proved, this action can be maintained.

It is an action of a novel character, but some of the rules which govern actions for malicious prosecutions apply to it, and are decisive of the question raised. If an action of this nature can be maintained at all, it is obvious that it can only be upon proof that the plaintiff in the former action, which is alleged to be malicious, had not a legal cause of action. If he had, it would be his right to enforce it by the remedies provided by law, and he would not be liable for any injuries which might incidentally result, although he acted with malice. In so doing, he commits no unlawful act for which an action will lie against him. *Lindsay v. Larned*, 17 Mass

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190; *Randall v. Hazelton*, 12 Allen, 412. The question whether Barry had a legal cause of action was involved in, and, we think, as between these parties, could only be tried in, the replevin suit. The male plaintiff, being a party to that suit, would be bound by its result. If Barry had recovered a judgment in that suit, this action could not be maintained, because it would thus be conclusively settled that his act in replevying the goods was lawful. Any irregularity in the service of the writ of replevin must be taken advantage of in that suit, or it must be deemed to have been waived. The fact that this suit is for an injury to the wife does not take the case out of the operation of this rule. It is one of the incidents of the marriage relation that the husband must join in such suit. It is substantially his suit; he can discharge it, and is entitled to the proceeds if judgment is recovered. *Southworth v. Packard*, 7 Mass. 95.

In an action for malicious prosecution, the plaintiff must show that the prosecution or suit complained of has been terminated by a judgment in his favor. In that suit only can the question, whether the defendant had a good cause of action against the plaintiff, be litigated. The reasons of the rule apply with equal force to an action like the present. It is against the policy of the law that the same questions should be litigated between the same parties in successive suits. At the time this action was commenced, the replevin suit, which is alleged to be malicious and without probable cause, was pending; and a majority of the court is of opinion that, if the plaintiffs can, under any circumstances, maintain an action of this nature, this fact is decisive against this action. *Johnson v. Shove*, 6 Gray, 498.

Exceptions overruled.

BROWN, plaintiff, v. WELLINGTON.

(105 Mass. 315.)

Tenants in common — purchase from co-tenant.

Plaintiff and B. were tenants in common of land, plaintiff being in occupation. Defendant bought standing grass of plaintiff, to be paid for when cut and harvested. *Held*, that defendant could not avoid paying plaintiff the contract price, when due, on the ground that B. forbade payment.

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ACTION on contract, to recover the price of grass sold by plaintiff to defendant. The case was submitted on the following agreed facts:

"The plaintiff and Henry A. Brown, on July 5, 1869, were, and for a long time had been, seized in fee, and been in possession, as tenants in common, in equal shares, of a lot of land in Waltham, and, previously to said day, the plaintiff brought a petition for partition thereof against Brown, which was pending on the day when this suit was brought, and continued pending some time afterward. On said day, the defendant bargained with the plaintiff for the grass then standing on the premises, and agreed to pay him \$20 therefor when the same was cut and harvested. Afterward the defendant cut and harvested the grass, and the plaintiff called on him on a Saturday for the money. The defendant told the plaintiff to call on the Monday following and he would pay him. He did call on the Monday following, when the defendant refused to pay him, Brown having in the mean time forbidden his paying the plaintiff."

If the court should be of opinion that on these facts the plaintiff could, in his own name, maintain the action, he was to have judgment for such sum as he was entitled to recover, and otherwise judgment be entered for the defendant.

T. Carlton, for plaintiff.

C. A. Welch, for defendant.

COLT, J. It is not necessary here to consider what the law is, as applicable to an action brought by one tenant in common of personal property to recover the full price of such property, sold by him without the consent of his co-tenant. The plaintiff's interest in the standing grass here sold was not that of a tenant in common of a specific chattel. He was tenant in common of real estate, and the property sold was part of the annual product of the soil. His right to deal with it as his own is governed by the law which regulates the rights of tenants in common, in the occupation and improvement of their land, and which is founded on that unity of possession which is the chief incident of such tenancies. The plaintiff had the right to the sole occupation of the premises owned in common, unless his co-tenant chose to occupy with him. If he took the whole profits, by the old rule of the common law, his co-tenant would have had

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no remedy against him. Afterward, by the statute of 4 and 5 Anne, chapter 16, section 27, an action of account charging him as bailiff might be maintained in favor of the co-tenant, provided he had actually received more than his share of all the rents and profits of the estate. Mere exclusive occupation under the statute was not enough. *Sargent v. Parsons*, 12 Mass. 149; *Badger v. Holmes*, 6 Gray, 118. An action of assumpsit lies in these cases, by repeated decisions in this commonwealth. *Shepard v. Richards*, 2 Gray, 424; *Munroe v. Luke*, 1 Metc. 459.

For all that appears in the statement of facts, the plaintiff alone occupied and improved the whole estate. If he occupied jointly with his co-tenant, it does not appear that his co-tenant has not received his share of the profits from some other product of the estate. At all events, the cutting of the grass by the plaintiff's authority, and the sale and delivery of it by him to the defendant, was an appropriation of it which gave the plaintiff a good title to the whole of it, so far as this defendant is concerned; and it is no defense to this action that the co-tenant, after it was cut and removed, forbade the defendant to pay for it. *Calhoun v. Curtis*, 4 Metc. 413; *Peck v. Carpenter*, 7 Gray, 283.

Judgment for the plaintiff for the amount claimed in the writ, with interest from the date of the writ.

. RHOADES, plaintiff, v. BLACKISTON.

(100 Mass. 204.)

Principal and agent — bankruptcy of agent — effect on contracts with third persons.

To the plea that the plaintiff is a bankrupt, and that all his estate vested in his assignees, it is a good replication that the whole beneficial interest in the contract or demand in suit was vested, by prior assignment, in a third party, for whose benefit the suit is prosecuted.

In an action for an alleged breach of contract, it appeared that the plaintiff made the contract, in his own name, in the course of a business which he was carrying on for L., and which he had previously transferred to L. as security for a debt with the agreement that L. should furnish all the capital, and receive

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all the profits, except enough to support plaintiff and his family, until the debt was paid, when the business and the profits should again become plaintiff's. After the alleged breach by defendant, plaintiff became bankrupt. *Held*, that plaintiff could maintain the action in his own name, and that his right of action did not pass to his assignees in bankruptcy.

ACTION for an alleged breach of contract to sell and deliver coal. It appeared that, after the alleged breach, the plaintiff was adjudged a bankrupt; that he made the agreement in his own name, while acting as agent of Alonzo V. Lynde, and that he made it as agent; that he owed Lynde a large sum of money, and had transferred his coal business to him as security for the debt; that it was agreed between them that Lynde was to furnish the capital, and was to receive all the profits of the business, except enough to support the plaintiff and his family, until the debt should be paid; that, after the debt was paid, the property was to be his, and the profits of the business; and that he had no property in the coal, or interest other than as stated, and his own money was not invested in the business; but that he was to have his living out of the business until the debt was paid.

The defendants objected that the plaintiff could not maintain the action, and the judge reported the case for the determination of the full court, if the court should be of opinion that the plaintiff could not maintain the action, judgment to be for the defendants, otherwise the case to stand for trial.

T. H. Sweetser and *C. Abbott*, for plaintiff.

W. A. Field, for defendants, cited United States Stat. of 1867, ch. 176, § 14; *Tamplin v. Wentworth*, 99 Mass. 63; *Wright v. Fairfield*, 2 B. & Ad. 727; *Ferguson v. Spencer*, 1 Man. & Gr. 987; *D'Arnay v. Chesneau*, 13 Mees. & Welsb. 796-809; *Parnham v. Hurst*, 8 id. 743; *Castelli v. Boddington*, 1 El. & Bl. 66, 879; *Beckham v. Drake*, 2 H. L. Cas. 579-632; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596.

COLT, J. It is a well-established rule of law that when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. If the agent sues, it is no ground of defense that the beneficial interest is in another, or that the plaintiff, when he recovers, will be bound to account to another. There is an additional reason for

giving this right to the agent, when he has a special interest in the subject-matter, or a lien upon it. But the rule prevails when the sole interest under the contract is in the principal. The agent's right is, of course, subordinate to and liable to the control of the principal, to the extent of his interest. He may supersede it by suing in his own name, or otherwise suspend or extinguish it, subject only to the special right or lien which the agent may have acquired. *Colburn v. Phillips*, 13 Gray, 64; *Fairfield v. Adams*, 16 Pick. 383; Story on Agency, § 403.

In this case, the contract relied on was made by the plaintiff in his own name, as agent for an undisclosed principal, who does not now in any way interpose. But, admitting the law of principal and agent as that stated, the defendants further contend that the plaintiff's right of action passed to his assignees in bankruptcy, who were appointed in proceedings commenced after the alleged breach. It appears that the plaintiff made the contract in the course of a business which he was carrying on for Alonzo V. Lynde, and which he had previously transferred to Lynde as security for a debt, with the agreement that, after the debt was paid, the property was to be his with the profits of the business, Lynde furnishing all the capital and receiving all the profits, except enough for the support of the plaintiff and his family, until the debt should be paid. And it is claimed that, upon these facts, the plaintiff had such a legal and equitable interest in the contract that it must pass by the bankruptcy proceedings to the assignees.

Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property. They take such estate only as the bankrupt had a beneficial as well as legal interest in, and which is to be applied for the payment of his debts. To a plea that the plaintiff is a bankrupt, and that all his estate vested in his assignees, it is a good replication that the whole beneficial interest in the contract or demand in suit was vested by prior assignment in a third party, for whose benefit the suit is prosecuted. If, however, the bankrupt has any beneficial interest in the avails of the suit, then the whole legal title vests in his assignee, and the action must be in his name, for there cannot be two legal owners of one contract at the same time. *Webster v. Scales*, 4 Doug. 7; *Winch v. Keeley* 1 T. R. 619; *Carpenter v. Marnell*, 3 B. & P. 40.

In most of the English cases in which these rules have been applied, there was an assignment of a chose in action by the bank-

rupt to a third party, made before the bankruptcy, and they have mainly turned on the question, whether the transfer was absolute or only as security for debt, and, if as security only, then further, on the question whether the security was of greater value than the debt secured, at the time of the bankruptcy. The case of *D'Arnay v. Chesneau*, 18 Mees. & Welsb. 796-809, relied on at the argument, was of this description, and Baron PARKE there declared: "That if the debt to be secured was less than the debt assigned, and there was nothing more than a simple assignment of the debt as a security, the right of action would vest in the insolvent's assignees. In such a case, they would have an immediate interest in the sum to be recovered, from which benefit to the creditors might result, and they would not have been bound to refund all they had recovered to the equitable assignee of the debt (their *cestui que trust*), which is the proper criterion." *Dangerfield v. Thomas*, 9 Ad. & El. 292.

The court are of opinion that the rule in these cases, if ever applicable to a case where an agent sues upon a contract, made in the course of his agency, where the suit is subject to the control of the principal, cannot be applied to defeat the plaintiff's action here. The pledged property consisted of a business to be carried on with the capital of the party to whom it was transferred. The contracts made in the course of it were the contracts of the principal. The agent had no immediate beneficial interest in them. His interest was only in the future profits, and that contingent on their being sufficient to pay the debt he owed. The contract of Lynde to restore the property to the plaintiff was executory, and there was no claim that the contingency had happened upon which the business and property were to become the plaintiff's. The inference from the facts reported is, that it did not. The support which he was to have for himself and his family was plainly in compensation for his agency in the business. And there is nothing to show that the creditors in bankruptcy have any valuable interest in the contract declared on. *Parnham v. Hurst*, 8 Mees. & Welsb. 743; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596; 3 Parsons on Contracts, 479.

Case to stand for trial.

Kelly v. Riley.

KELLY, plaintiff, v. RILEY.

(106 Mass. 330.)

Breach of promise of marriage — promisor already married — seduction as aggravation of damages.

In an action by a woman for breach of a promise of marriage, *held*, that the action could be maintained although the defendant was married at the time of the promise, if the plaintiff was ignorant thereof; also, that evidence that plaintiff was seduced by defendant under promise of marriage was admissible in aggravation of damages. (*See note, p. 333.*)

ACTION for breach of a promise of marriage. At the trial evidence was introduced to show that defendant was a married man at the time of the promise, and the defendant requested the judge to rule that the action could not, therefore, be maintained. The judge declined so to rule, but ruled that the action could be maintained if the plaintiff was ignorant of the fact that defendant was married at the time of the promise. The plaintiff offered evidence that, induced by the promise of marriage, she submitted to sexual intercourse with defendant, and became pregnant by him, and was delivered of a child now living. This evidence was admitted, under defendant's objection, as affecting the measure of damages. The judge charged the jury as follows:

"Promises of marriage, not often being made in the presence of witnesses or in writing, have usually, in cases of this nature, been proved by circumstantial evidence. As the promise of the plaintiff is the consideration of the promise of the defendant, both must be proved in order to support the action; and each promise may be established by the same species of proof; and the conduct and deportment, as well as the language of the parties, toward each other, may furnish satisfactory evidence of the fact that a mutual promise of marriage has been made between them; that is, a promise of marriage by one and a corresponding promise of marriage by the other.

"In determining what sum of money would reasonably indemnify and compensate the plaintiff for a breach of the defendant's contract with her, the jury may consider, in addition to her expenditure in preparing, the disappointment of her reasonable expecta-

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tions, and inquire what she has lost by her disappointment, and for that purpose consider, among other things, what would be the money value or worldly advantage (separate from considerations of sentiment and affection) of a marriage which would give her a permanent home, and the advantage of such a domestic establishment as would be suitable to her as the wife of a person of the defendant's estate and station in life. The jury ought also to consider whether her affections were in fact implicated, and whether she had become attached to the defendant, and, if such was the fact, the wound and injury to her affections would be an additional element in the computation of her damages; and also to consider whatever mortification, pain or distress of mind she suffered, resulting from the discovery of the defendant's inability to marry, by reason of his living wife, or his refusal to marry her within a reasonable time after the contract was made between them, if he was not disabled from doing so by reason of a living wife. And if, while the parties were mutually promised in marriage, and intending and expecting marriage in a short time, the defendant solicited, in consideration of such intention and expectation, and the plaintiff permitted, in consideration of such expectation and intention, sexual intercourse with her, whereby she became pregnant with a child, which was born alive, and is now living, these facts may be considered by the jury in computing damages, so far as they tend to aggravate and increase the disappointment, mortification, pain or distress of mind which she has suffered by reason of the defendant's breach of contract."

A verdict for the plaintiff was returned, and the defendant alleged exceptions. The plaintiff moved for judgment. The exceptions were all waived, and plaintiff's motion denied.

To the refusal of the judge to grant her motion, and to his allowance of the defendant's exceptions, the plaintiff alleged exceptions.

J. N. Marshall, for plaintiff.

G. Stevens, for defendant.

COLT, J. (After deciding a question of practice.) It remains to dispose of the exceptions of the defendant, taken at the trial. The court was asked to rule that, if the defendant was a married man at the time of his promise, the plaintiff could not be injured by a fail-

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ure to perform, and though she had no knowledge of the fact at the time, could not maintain this action. This was properly refused. The defendant is not permitted to escape responsibility on the ground of his present legal inability to perform a promise of marriage to an innocent party. The damages to the plaintiff are certainly not diminished by the consideration that the promise was made under such circumstances. The strict rule that a consideration to support a promise is insufficient, if its performance is utterly and naturally impossible, is met by the suggestion that, even if the future performance here is to be treated as utterly impossible, yet the detriment or disadvantage which must necessarily result to the plaintiff in relying for any time on the promise affords sufficient consideration to support the defendant's contract. 2 Para. on Cont. (5th ed.) 67; *Wild v. Harris*, 7 O. B. 999.

The defendant also insists that the evidence of seduction was not admissible in aggravation of damages. But in a recent case the contrary has been held by this court, on the ground that compensation to the plaintiff for the injury she has received by the breach of the contract cannot be fully reached without taking into account the situation in which she is left by the defendant's act. *Sherman v. Rawson*, 102 Mass. 395. The instructions actually given by the learned judge, as to the nature of the evidence by which the promise was to be proved, and the elements to be considered by the jury in estimating the damages, were full and accurate.

The defendant's exceptions are accordingly overruled, and the plaintiff may now therefore renew her motion in the superior court, where the case remains, that judgment be rendered as of the day and term when the verdict was returned.

Ordered accordingly.

NOTE. — On the first point see *Cover v. Descomport*, 3 Am. R. 704, wherein the same principle was held. — RMR.

Burt v. Merchants' Insurance Co.

BURT, petitioner, v. MERCHANTS' INSURANCE CO.

(106 Mass. 356.)

Constitutional law. Eminent domain — grant by State to the United States.

A State legislature may delegate the right of eminent domain to an agent of the United States for the purpose of obtaining land in such State as a site for a post-office.

By an act of the legislature of Massachusetts, an agent of the United States was authorized to purchase land in the State for the site of a post-office.

The act provided that, when the agent and the owners of the land could not agree upon the price, there should be an appraisement made by a jury. *Held*, that in order to obtain the land and the appraisement, it was not necessary that the owner should first *consent* to a sale.

PETITION under an act of the legislature of 1870, chapter 327, by William L. Burt, agent of the United States, to obtain an appraisement of land which the statute authorized the United States, through its agent, to purchase for the site of a post-office. The land was owned by the Merchants' Insurance Company, respondents, who could not agree with the agent for the price to be paid. By section 2 of the act, it was provided that, "if the agent or agents employed by the United States, and the person or persons owning or interested in either of said estates, cannot agree upon the price to be paid for their interest therein, the agent or agents of the United States may apply by petition to the superior court for the county of Suffolk, such petition to be made separately as to each of said estates, describing the estate and praying to have the valuation thereof made by a jury," etc. The respondents claimed that the statute was unconstitutional and void, and that they never agreed to sell the land or the United States to buy it. The petition was denied. The petitioner alleged exceptions.

G. A. Somerby and T. S. Dunn, for petitioner.

J. D. Ball, for respondents.

CHAPMAN, C. J. This process is brought to obtain an appraisement of a track of land described in the petition, alleging that the petitioner, who is the agent of the United States, and the respond-

ents, who are owners of the land, cannot agree upon the price to be paid for it. It is contended that the process cannot be maintained unless there has been an agreement of the petitioner that he will buy, and of the respondents that they will sell, leaving merely the question what is to be paid unsettled; and that, without such agreement, neither the constitution nor the language of the statute authorizes the United States to take the land upon the appraisement of a jury.

It is obvious that, if the statute does not require an agreement of any kind on the part of the land-owner, it is intended as an exercise of the right of eminent domain. The respondents deny the power of the legislature to delegate the exercise of this right to an agent of the United States, for the purpose of obtaining a site for a post-office.

It cannot be held that the legislature must exercise this right by its own agents, appointed exclusively for that purpose. There is no constitutional provision on the subject. Article 10 merely provides that, whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor. The usual method of making the appropriation is to authorize some corporation to take the property in the manner prescribed by a statute. In this manner, the right of eminent domain is exercised by railroad, turnpike, canal and aqueduct corporations; and the property passes, not to the State, but to them. In the same way, land is taken by counties for court-houses, and by towns for school-houses. And from a very early period the legislature have been in the habit of consenting that the United States may take land for various public purposes.

Some of these acts contain merely a consent to a purchase, as statute 1855, chapter 127, relating to the custom-house in Barnstable, and statute 1858, chapter 157, relating to land for the United States court-house in Boston. Where the parties have already agreed, there is no need of any further provision. But many of them are almost precisely like the act in this case. They first consent to a purchase, and then provide that, if the parties cannot agree in a sale or a purchase, the land may be appraised by a jury upon petition, and on payment or tender of the amount of the appraisement, with costs, the land shall vest in the United States.

Of this character was statutes of 1798, chapter 13, consenting to the purchase of land for the Springfield armory; also statutes of 1800,

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chapter 26, consenting to the purchase of land in Charlestown for the purpose of a navy or dock-yard. Under this last act the agent of the United States took the land by procuring the appraisement of a jury. See *Harris v. Elliott*, 10 Pet. 25. So that the right of eminent domain was actually exercised under the act, and the supreme court of the United States assume the legality of the act, and say that the title vested in the United States by virtue of the act. In 1790, chapter 4, a similar act was passed in respect to certain light-houses; in 1798, in respect to Castle Island; in 1816, chapter 15, in respect to land in Watertown for an ordnance depot; in 1835, chapter 98, in respect to a light-house in Marblehead. These, and several other acts not cited, show that the legislature have habitually authorized the United States to acquire lands by an exercise of the right of eminent domain. It could not be ascertained, without investigation, in which of the cases referred to they have been obliged to resort to the appraisement of a jury. But it is now too late to question the validity of such acts, even if there could have been any reasonable doubt about it originally. No intelligent person can suppose that the State is not interested in the establishment of light-houses, navy-yards and arsenals within its limits, quite as much as the United States. And as to a post-office in the city of Boston, the people of that city are peculiarly interested in it. The whole commonwealth is also largely interested in it; and it is established by the United States for a purpose exclusively public. It is difficult to conceive of a more proper case for the exercise of the rights of eminent domain.

Adjudications have been made upon this subject in some of the States. In *Reddall v. Bryan*, 14 Md. 444, it was held that, under this right, the legislature of that State might authorize the taking of water to supply the city of Washington. In *Gilmer v. Lime Point*, 18 Cal. 229, an act of the legislature of California authorized the agents of the United States to take certain lands for fortifications, and if the owners were unknown or were incapable of conveying, or refused to convey, the agent of the United States might apply for an appraisement by a jury, and upon tender or payment of the amount of the verdict and costs, the sheriff of the county might convey the land. The validity of this statute was contested, the case was discussed very elaborately, and the court held that it was a valid exercise of the right of eminent domain.

We cannot doubt the validity of the act in question in this case. But it is further contended that the terms of the act itself do not

authorize this application for an appraisement by a jury, unless the respondents shall first have given their consent to a sale.

It is obvious that such a construction of the second section would defeat its own end; for, if the consent of the owner must first be obtained, he will never give it until the buyer agrees to pay the price that he is willing to take. He may either fix it himself or agree that some one else shall fix it. But the provision as to the right to apply for a jury is nugatory. We cannot suppose that the legislature intended to deal thus with the United States. It is to be assumed that they used the word "purchase" in its legal signification. It includes every lawful method of coming to an estate by the act of a party, as opposed to the act of law. Thus it includes titles obtained by sale of property on execution by a sheriff, or by levy, in which cases there is no consent of the debtor, nor any conveyance from him. And it includes titles obtained by exercise of the right of eminent domain. If a statute authorizes the appraisement by a jury, and vests the title upon payment or tender of the amount of the verdict, with costs, the property is held under a statute conveyance, and the title is, in legal phrase, by purchase.

As the parties in this case could not agree upon the price to be paid, the contingency has arisen which authorizes the court to proceed upon the petition, and procure an appraisement by a jury. It could not be necessary to obtain a consent to the sale, which, of necessity, includes some agreement either fixing the price definitely or providing some method by which it shall be fixed. Nor is the statute to be construed as subjecting the United States to the option of the owners of the property in respect to an important public interest. The petitioner is entitled to proceed and obtain an appraisement under the statute, and, upon a compliance with the conditions which it prescribes, the title will vest in the United States by force of the statute.

Exceptions sustained.

AMES, plaintiff in review, v. FOSTER.

(106 Mass. 400.)

Statute of frauds — promise to pay debt of another.

The mortgagee of part of a vessel promised persons who had furnished her with supplies, for which they had no lien on her, to pay the debt if they would not attach the interest of the other part owners. *Held*, that the promise was within the statute of frauds.

WRIT of review to reverse a judgment recovered against plaintiff in review in the superior court. The opinion states the case.

J. D. Ball, for plaintiff in review.

S. J. Thomas, for defendants in review.

MORTON, J. The only question involved in this case arises under that clause of the statute of frauds which provides that no action shall be brought "to charge a person upon a special promise to answer for the debt, default or misdoings of another unless the promise, or some memorandum or note thereof, is in writing, and signed by the party to be charged, or his agent." Gen. Stats., ch 105, § 1, cl. 2.

The plaintiffs in the original action claim to hold the defendant upon the ground of an express promise to pay the amount of a debt due to the plaintiffs by the owners of the steamer N. P. Banks, for wood and coal furnished prior to October 1, 1868. At this time McKay & Aldus, of Boston, owned three-fourths of the steamer, and the other fourth was owned by parties in New York. In December, 1868, McKay & Aldus went into bankruptcy, having previously mortgaged their interest to the defendant Ames. In the spring of 1869 the plaintiffs heard that the steamer was to be carried to New York to be sold, and they threatened to attach her, and thereupon Ames promised to pay the bill if they would not attach her.

It is to be observed that Ames was not originally liable upon the bill, being merely a mortgagee. *Howard v. Odell*, 1 Allen, 85. The plaintiffs do not claim that they had a lien upon the vessel.

They had no right to attach the interest of McKay & Aldus, who were in bankruptcy. The only legal consideration, therefore, of the defendant's promise, was the forbearance of the plaintiffs to attach the interest of the New York owners. Upon this state of facts, the learned judge who presided at the trial instructed the jury, that "if, for the benefit and at the request of Ames, the said Foster gave up or surrendered some advantage which he had, such as a means of collecting his debt or the like, and in consideration thereof Ames promised to pay this bill, he would be liable, although the promise was not in writing." We do not think that these instructions, applied to the facts of this case, were correct or sufficient. As we have seen, the only consideration of the defendant's promise was that the plaintiffs forbore to attach the interest of the New York owners; and we are of opinion that the jury should have been instructed that such promise was within the statute of frauds.

The defendant's promise was, in its primary and essential character, a promise to guarantee the debt of another. Its object was to secure the payment of the old debt, which was not extinguished. The defendant's liability was collateral and contingent, would exist as long as the original debt existed, and would be extinguished whenever the original debtors should pay that debt. It was not in any sense his debt; the original party remained liable; and there is an entire absence of any liability on the part of the defendant or his property, except such as arises from his express promise. *Forth v. Stanton*. 1 Saund. (6th ed.) 211, note. When all these elements concur, we know of no case in this commonwealth which sanctions the doctrine that such promise loses its character as collateral, and becomes an original promise, because there is a consideration which is beneficial to the promisor.

In *Alger v. Scoville*, 1 Gray, 391, 396, SHAW, C. J., says that "it has been held that when the leading and obvious object of the promisor was to induce the promisee to forego some lien, interest, benefit or advantage held by him, and to transfer that interest, or confer that or some equivalent benefit on the promisor, although the effect may be to discharge neither from an obligation, still it is a new, independent and original contract between the parties, and is not within the statute of frauds required to be in writing."

In *Curtis v. Brown*, 5 Cush. 488, SHAW, C. J., states that "it is no sufficient ground to prevent the operation of the statute of frauds, that the plaintiff has relinquished an advantage, or given up a lien,

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in consequence of the defendant's promise, if that advantage has not also directly inured to the benefit of the defendant, so as in effect to make it a purchase by the defendant of the plaintiff. The cases in which it has been held otherwise are those where the plaintiff, in consideration of the promise, has relinquished some lien, benefit or advantage for securing or recovering his debt, and where by means of such relinquishment the same interest or advantage has inured to the benefit of the defendant. In such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase, by the defendant of the plaintiff, of the lien, right or benefit in question."

It is equally true that it is no sufficient ground for taking the case out of the statute, that the defendant has received some benefit from the consideration of his promise. If this were so, then every promise to guarantee the debt of another, made upon a pecuniary consideration paid by the promisee to the promisor, would be taken out of the statute. In all cases, the question is, whether the promise is in substance a promise to pay the debt of another, or whether it is a promise by the promisor to pay his own debt, the extent of which is measured by the amount due by another.

We think the authorities in this State have gone no further than to decide that a case is not within the statute, where, upon the whole transaction, the fair inference is, that the leading object or purpose and the effect of the transaction was the purchase or acquisition by the promisor from the promisee of some property, lien or benefit which he did not before possess, but which inured to him by reason of his promise, so that the debt for which he is liable may fairly be deemed to be a debt of his own, contracted in such purchase or acquisition. *Nelson v. Boynton*, 3 Metc. 396; *Fish v. Thomas*, 5 Gray, 45; *Burr v. Wilcox*, 13 Allen, 269; *Furbish v. Goodnow*, 98 Mass. 296; *Browne on Stat. of Frauds* (3d ed.), § 214, c. d.

Applying this test to the facts of this case, it is clear that the promise of the defendant Ames was within the statute. It is true, or probable, that he indirectly received some benefit from the forbearance of the plaintiffs to attach the interest of the New York owners, but the purpose or effect of the transaction was not to transfer to him any lien or advantage. He acquired no rights which he did not before possess, and it is impossible to regard the promise

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as an original promise founded upon the consideration of a purchase by him. We are of opinion, therefore, that the jury should have been instructed in accordance with the request of the defendant Ames, that the plaintiff, upon the facts found, was not entitled to recover.

Exceptions sustained.

LARNED, plaintiff, v. ANDREWS.

(106 Mass. 425.)

Sale—neglect of vendor to pay special tax does not invalidate.

Goods were sold and delivered by plaintiff to defendant. In an action to recover the contract price, *held*, that the fact that plaintiff was a wholesale dealer, and, during the time when the goods were sold, had not paid the special tax imposed by act of congress, of 1864, chapter 178, section 79, did not invalidate the sales or prevent a recovery.

ACTION on contract for the price of goods sold and delivered. The opinion sufficiently states the case. Verdict for plaintiff. Defendant alleged exceptions.

J. S. Abbott, for defendant.

J. B. Richardson, for plaintiff.

MORTON, J. The goods, for the price of which this suit was brought, were sold and delivered by the plaintiff to the defendant. The defendant offered to show that, during the time when the goods were sold, the plaintiff was a wholesale dealer and had not paid the special tax imposed upon wholesale dealers by the seventy-ninth section of the act of congress, approved June 30, 1864. U. S. Stats. 1864, ch. 173, § 79; 13 U. S. Stats. at Large, 251. The superior court ruled that these facts, if proved, would furnish no defense to the action, and excluded the testimony.

We are of the opinion that this ruling was correct. The general principle, that no action based upon a contract which is illegal can

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be maintained, is too well established to need the citation of authorities. But, to make this principle applicable in any case, it must appear that the contract or transaction upon which the action is based was prohibited by law. The question in this case, therefore, is, whether the act of June 30, 1864, is to be construed as prohibiting every sale made by a wholesale dealer who neglects to pay the special tax imposed by that act.

The seventy-first section of the act is as follows: "No person, firm, company or corporation shall be engaged in, prosecute or carry on any trade, business or profession, hereinafter mentioned and described, until he or they shall have paid a special tax therefor in the manner hereinafter provided." The seventy-third section provides that any one who shall exercise or carry on any trade, business or profession, for the carrying on of which a special tax is imposed by law, without payment thereof, as in that behalf required, shall be subject to fine and imprisonment. The seventy-ninth section provides that wholesale dealers, whose annual sales do not exceed fifty thousand dollars, shall pay fifty dollars; and if their annual sales exceed fifty thousand dollars, for every additional thousand dollars they shall pay one dollar, and the amount of all sales beyond fifty thousand dollars shall be returned monthly to the assistant assessor, and the tax thereon shall be assessed and paid monthly, as other monthly taxes are assessed and paid. The section further provides that every person whose business it is to sell goods, with certain exceptions not material to this case, shall be regarded as a wholesale dealer, whose annual sales exceed \$25,000.

It is to be observed that the act does not expressly declare that sales by a wholesale dealer who neglects to pay the tax shall be illegal. The tax is not laid upon each sale, but upon the business or calling. The illegality does not attach to the sale, but consists in not paying the tax imposed upon the business. If a dealer's annual sales exceed twenty-five thousand dollars, and he neglects to pay the tax imposed on wholesale dealers, he is liable to the same penalty, without regard to the number of his sales. The payment of the tax is not a condition precedent to the right to make sales. If his sales exceed fifty thousand dollars, the amount of the tax is ascertained by his return monthly of sales previously made by him. Thus all sales in excess of \$50,000 are clearly legal at the time when made; and it would be a forced construction to hold that they are made illegal by relation back, because the seller neglects to pay a tax imposed upon him.

These and other considerations lead us to the conclusion that it was not the intention of congress to prohibit and make unlawful each sale made by a wholesale dealer who neglects to pay his tax. The object of the tax was to provide internal revenue to support the government, and not to regulate domestic trade in the States. It imposes a tax upon wholesale dealers, and provides a penalty if they neglect to pay such tax. We think this was designed to operate upon the person, and not upon the business. If congress had intended to subject the dealer neglecting to pay his tax to the additional liability of having all his sales rendered illegal, we think they would have so declared in unequivocal terms. We find that in section 180 it is provided that, if any person liable to pay any tax upon goods or manufactures shall sell the same before the tax is paid, with intent to evade the tax, every debt contracted in such sale shall be void, and the collection thereof shall not be enforced in any court. The absence of any such provision in regard to sales by wholesale dealers raises a strong implication that it was not the intention of congress to prohibit such sales. The power to regulate domestic trade belongs exclusively to the States. It cannot be exercised by congress, except where it is strictly incidental to the exercise of powers clearly granted to it. *License Tax Cases*, 5 Wall. 462; *Pervear v. Commonwealth*, id. 475; *Commonwealth v. Holbrook*, 10 Allen, 200. It is not to be presumed that congress intends to regulate domestic trade in the States, as incidental to its power to levy taxes, unless such intention is clearly expressed.

Upon a careful consideration of the statute in question, we are of opinion that the sales by the plaintiff were not prohibited or illegal, and that he is entitled to recover. The numerous cases cited by the defendant do not apply to the case at bar. They are cases where the specific contract or transaction upon which the plaintiff's action was founded was prohibited by law.

A very similar question arose in *Smith v. Mawhood*, 14 Mees. & Welsb. 452. The act of 6 Geo. IV, ch. 81, § 26, provided that if any person should carry on any trade or business thereafter mentioned, without taking out a license, he should forfeit and lose the penalties thereafter named. In an action of debt for tobacco sold, the defense was that the plaintiff had not taken out a license required by this section. It was held that the act of sale was not unlawful. Baron PARKE said: "I think the object of the legislature was not to prohibit a contract of sale by dealers who have not taken

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out a license pursuant to the act of parliament. If it was, they certainly could not recover, although the prohibition was merely for the purpose of revenue. But its object was not to vitiate the contract itself, but only to impose a penalty on the party offending, for the purposes of the revenue."

The question involved in the case at bar has been carefully considered in a recent case in Vermont, and the court arrived at the same conclusion which we have reached. *Aiken v. Blaisdell*, 41 Vt. 655, 666.

Exceptions overruled.

NATIONAL BANK OF NORTH AMERICA, plaintiff, v. BANGS.

(106 Mass. 441.)

Money paid on forged check — recovery of, by drawee.

The payee of a forged check, drawn payable to his order, took it from a third person, without inquiry, although in good faith and for value, and indorsed it for collection; and the drawee paid it. *Held*, that the drawee could recover the amount so paid from the payee.

The responsibility of the drawee, who pays a forged check for the genuineness of the drawer's signature, is absolute only in favor of one who has not, by his own fault or negligence, contributed to the success of the fraud or to mislead the drawee. (*See note, p. 358.*)

ACTION to recover back money paid by plaintiffs in a forged check. The case was submitted on the following agreed statement of facts:

"The defendants, on September 21, 1869, took of some person (whom they do not remember, and did not remember when they were first notified of the alleged forgery, and could not then tell whether he was a stranger to them or a person known to them) in good faith and for full value, in payment for gold sold by them in the usual course of their business, a check payable to their order, of which the following is a copy:

"\$1,308.63. National Bank of North America. Boston, Sept. 21st, 1869. Pay to the order of E. D. & G. W. Bangs & Co, Thirteen hundred and eight dollars and sixty-three cents.

"No. 932.

WILLIAM D. BICKFORD."

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"On said September 21 the defendants deposited this check, with others, and with their other moneys, in the Maverick National Bank of Boston, where they kept their deposits; and before depositing it, for the purpose of enabling the Maverick National Bank to collect the check from the National Bank of North America, and, in accordance with the usage of depositors of checks payable to order, they indorsed it in blank by writing on the back of it 'E. D. & G. W. Bangs & Co.' The Maverick National Bank the next day presented the check at the clearing-house, when it was allowed and paid to the Maverick National Bank by the National Bank of North America in the usual manner of settling the daily balances of banks at the clearing-house.

"The Maverick National Bank, on the day of deposit, credited the defendants with the amount of the check in its account with them; and the National Bank of North America, on September 22, debited William D. Bickford, in whose name the check purported to have been drawn, and who was a customer of and a depositor in the National Bank of North America, and had funds on deposit there, with the amount of the check. The check was retained by the National Bank of North America until the 1st or 2d of October, 1869, when it was sent with other checks, by the National Bank of North America, to William D. Bickford, with the monthly statement of his account, according to the usage of banks. Bickford, after examining the checks, pronounced this a forgery, and on the 4th of October informed the bank of it; and on the same day the defendants were notified by the National Bank of North America that the check was forged, which was the first intimation or suspicion they had that the check was forged. For the purposes of the hearing on this statement of facts, it is admitted that the check was a forgery."

Both banks belonged to the Boston Clearing-House Association.

"It was the usage for each bank belonging to the Clearing-House Association, each morning, at ten o'clock, to have at the clearing-house, for the purpose of effecting settlements with the other banks, all the checks and other demands, such as bills, etc., it had received against all the other banks during the preceding day; making them up into separate bundles for each bank, with a ticket containing the items and aggregate of the contents of each bundle. The settlement was made at the clearing-house upon the footings of these tickets, without regard to the fact whether the contents of the bun-

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dle were correctly ticketed, or formed good claims against the bank charged with the contents of the bundle as per ticket; and in from ten to fifteen minutes past ten o'clock the messenger from each bank was able to receive and take to his bank all the claims of the other banks against it. On the return of the messenger to his bank, the messenger delivers to the paying teller the various bundles of demands against the bank; and it was the usage for the paying-teller, or some other officer of the bank charged with that duty, to immediately proceed to open and examine the contents of these bundles, ascertaining whether the contents of each bundle corresponded with the ticket, and whether each check was properly signed, drawn and indorsed, and whether the drawers of the check had funds deposited, sufficient to meet the amount drawn; and all this is completed before one o'clock of the same day; and all checks not then returned to the banks from which they were received are then charged to the drawers, in the same manner as if they had been presented and paid at the counter of the bank.

"It is agreed that the bank of North America acted in good faith in the premises."

H. C. Hutchins and H. H. Currier, for plaintiffs.

W. A. Field, for defendants.

WELLS, J. This suit is brought to recover money paid upon a check purporting to be drawn by one Bickford, upon the plaintiff bank, to the order of the defendants, indorsed by them, deposited with their banker, and collected through the clearing-house. The signature of the drawer proved to be a forgery. As the discovery of the forgery was not made in time to enable the plaintiff to return the check, as of absolute right, under the rules of the clearing-house, we think the case must stand as if the payment had been made directly at the plaintiff's counter, in the ordinary mode.

The right of return, secured by the rules of the clearing-house, is a special provision, in compensation for payment without inspection. Instead thereof, the rules give opportunity for subsequent inspection. When that has been had, the special rules cease to govern; and the rights of the paying bank rest upon the general principles of law. *Boylston National Bank v. Richardson*, 101 Mass. 287. But, in applying those general principles, it was held, in *Merchants' National*

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Bank v. National Eagle Bank, 101 id. 281, that the drawee of a check, who paid it without inspection, under the provisions of the clearing-house rules, might recover back the money if there had been no actual laches on the part of the drawee, and no change of position on the part of the holder; notwithstanding "the failure of the bank to return a check by one o'clock," as allowed by the rules. The failure in that case was by accident, and involved no neglect.

In this case the money was paid to the use of the defendants. In making up and returning the monthly account of its depositor, the forgery was discovered and made known to the plaintiff, and notice thereof was immediately given to the defendants. In this respect the case shows no laches on the part of the plaintiff, and no change of situation on the part of the defendants which can defeat a recovery, if any right of recovery ever existed, or could arise from the payment in the manner stated. *Merriam v. Wolcott*, 3 Allen, 258; *Canal Bank v. Bank of Albany*, 1 Hill, 287.

If the suit were between the bank, or drawee, and a party who took the check in the usual course of business, finding it in circulation, or even by first indorsement from the payee, the loss would fall upon the bank; because, having greater means and opportunity to become familiar with the handwriting of their correspondents or depositors, the law presumes that drawees will know their signatures and be able to detect forgeries. From this presumption arises what is often called an obligation or responsibility on the part of the drawee of a bill or check, which prevents him from recovering back money paid upon it on the ground of a mistake of fact. *Price v. Neal*, 3 Burr. 1354; *Levy v. Bank of the United States*, 1 Binn. 27; *Bank of St. Albans v. Farmers & Mechanics' Bank*, 10 Vt. 141. But this responsibility, based upon presumption alone, is decisive only when the party receiving the money has in no way contributed to the success of the fraud, or to the mistake of fact under which the payment was made. "If the loss can be traced to the fault or negligence of either party, it shall be fixed upon him." *Gloucester Bank v. Salem Bank*, 17 Mass. 33, 42. In the absence of actual fault or negligence on the part of the drawee, his constructive fault, in not knowing the signature of the drawer and detecting the forgery, will not preclude his recovery from one who has received the money with knowledge of the forgery, or who took the check, under circumstances of suspicion, without proper precautions, or whose conduct has been such as to mislead the drawee, or to induce.

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him to pay the check without the usual scrutiny or other precautions against mistake or fraud. These exceptions are implied by the very terms in which the general rule is ordinarily stated. The case of *Ellis v. Ohio Insurance and Trust Co.*, 4 Ohio, 628, is an express decision to that effect, and contains an able and thorough discussion of the subject. We are aware of no case in which the principle that the drawee is bound to know the signature of the drawer of a bill or check, which he undertakes to pay, has been held to be decisive in favor of a payee of a forged bill or check, to which he has himself given credit by his indorsement.

In the present case, the check had not gone into circulation, and could not get into circulation until it was indorsed by the defendants. Their indorsement would certify to the public, that is, to every one who should take it, the genuineness of the drawer's signature. Without it, the check could not properly be paid by the plaintiff. Their indorsement tended to divert the plaintiff from inquiry and scrutiny, as it gave to the check the appearance of a genuine transaction, to the inception of which the defendants were parties. Their names upon the check were apparently inconsistent with any suspicion of a forgery of the drawer's name.

But to the defendants the presentation, by a stranger or third party, of a check purporting to be drawn to their own order, which such third party proposed to negotiate to them for value, was a transaction which should have aroused their suspicions. It ought to have them upon inquiry for explanations; and if inquiry had been properly made it would have disclosed the fraud, and prevented the success. The case finds that they acted in good faith. But that does not exclude such omission of due precautions as to deprive them of the right to throw the loss upon another party who acted in like good faith, and also without fault or want of due care.

It is possible that the defendants may have received the check under circumstances which would exonerate them from the imputation of any actual fault or neglect. But the agreed statement fails to disclose any such explanation. A majority of the court are therefore of opinion that the judgment must be for the plaintiff, for the amount of the check and interest from the time it was paid.

Ordered accordingly.

NOTE. — See *National Park Bank v. Fifth National Bank*, 7 Am. R. 310 and note. — *See*.

SALISBURY, plaintiff, v HERCHENRODER.

(106 Mass. 458.)

Highway — injury by falling sign — proximate and remote cause.

Defendant suspended a sign over a street in Boston, in violation of a public ordinance of the city. During an extraordinary gale the sign was blown down, and a bolt, part of the fastenings, was hurled against plaintiffs' window, causing damage, for which action was brought. *Held*, that defendant was liable, notwithstanding due care was exercised in constructing and fastening the sign. (*See note, p. 355.*)

ACTION to recover for injuries done to a building owned and occupied by plaintiffs in Avon street, Boston. Defendant was lessee and occupant of an adjoining building, and had suspended a sign or banner over the street. Due care was exercised in the construction and fastening of the sign. The sign was, however, suspended in violation of an ordinance of the city, which made defendant liable to a penalty. It was blown down by an extraordinary gale, and in its fall a bolt, which was part of the fastenings, was hurled into the window of plaintiffs' building, causing the injuries complained of. Judgment in the superior court for defendant. Plaintiffs appealed.

J. P. Treadwell, for plaintiffs.

R. Stone, Jr., for defendant.

CHAPMAN, C. J. If the defendant's sign had been rightfully placed where it was, the question would have been presented whether he had used reasonable care in securing it. If he had done so, the injury would have been caused, without his fault, by the extraordinary and unusual gale of wind which hurled it across the street and against the plaintiffs' window. The party injured has no remedy for an injury of this character, because it is produced by the *vis major*. For example, a chimney or roof, properly constructed and secured with reasonable care, may be blown off by an extraordinary gale, and injure a neighboring building; but this is no ground of action.

But the defendant's sign was suspended over the street in viola-

Salisbury v. Herchenroder.

tion of a public ordinance of the city of Boston, by which he was subject to a penalty. *Laws and Ordinances of Boston* (ed. 1863), 712. He placed and kept it there illegally, and this illegal act of his has contributed to the plaintiffs' injury. The gale would not of itself have caused the injury, if the defendant had not wrongfully placed this substance in its way.

It is contended that the act of the defendant was a remote and not a proximate cause of the injury. But it cannot be regarded as less proximate than if the defendant had placed the sign there while the gale was blowing; for he kept it there till it was blown away. In this respect, it is like the case of *Dickinson v. Boyle*, 17 Pick. 78. The defendant had wrongfully placed a dam across a stream on the plaintiff's land, and allowed it to remain there; and a freshet came and swept it away; and the defendant was held liable for the consequential damage. It is also, in this respect, like the placing of a spout, by means of which the rain that subsequently falls is carried upon the plaintiff's land. The act of placing the spout does not alone cause the injury. The action of the water must intervene, and this may be a considerable time afterward. Yet the placing of the spout is regarded as the proximate cause. So the force of gravitation brings down a heavy substance, yet a person who carelessly places a heavy substance where this force will bring it upon another's head, does the act which proximately causes the injury produced by it. The fact that a natural cause contributes to produce an injury, which could not have happened without the unlawful act of the defendant, does not make the act so remote as to excuse him. The case of *Dickinson v. Boyle* rests upon this principle. See, also, *Woodward v. Aborn*, 35 Me. 271, where the defendant wrongfully placed a deleterious substance near the plaintiff's well, and an extraordinary freshet caused it to spoil the water; also *Barnard v. Poor*, 21 Pick. 378, where the plaintiff's property was consumed by a fire carelessly set by the defendant on an adjoining lot; also *Pittsburgh City v. Grier*, 22 Penn. 54; *Scott v. Hunter*, 46 Penn. St. 192; *Polack v. Pioche*, 35 Cal. 416-423.

Judgment for plaintiffs.

NOTE.— That a municipal corporation is not liable to one injured by a falling sign was held in *Taylor v. Peckham*, 5 Am. R. 578, and in *Jones v. Boston*, 6 Id. 194.—*Emf.*

SULLIVAN, appellant, v. SULLIVAN.

(188 Mass. 474.)

Will—wife of devisee as attesting witness.

A wife is not a competent witness to a will containing a devise to her husband.

By statute it was provided that "all beneficial devises made in any will to a subscribing witness thereto shall be wholly void, unless there are three other competent witnesses to the same." A wife was one of the three subscribing witnesses to a will containing a devise to her husband. It was contended that the devise to the husband was a "beneficial devise" to the wife, and, therefore, void, leaving her a competent attesting witness to the rest of the will. *Held*, that the contention could not be maintained, and, there not being the required number of competent witnesses required by law, the will was invalid.

APPEAL from a decree respecting a will. The opinion states the case.

N. C. Berry, for appellee.

L. M. Child, for appellant.

GRAY, J. This is an appeal from a decree of Mr. Justice WELLS, by which a decree of the probate court, allowing as the will of Margaret Sullivan an instrument which contained a devise to Thomas Sullivan, and to which his wife was one of the three attesting witnesses, was reversed; and the only question is, whether, upon these facts, she was a competent attesting witness to the will.

By the law of this commonwealth, a will must be attested by three competent witnesses, that is to say, witnesses who at the time of the attestation would be competent by the rules of the common law to testify concerning the subject-matter. *Hawes v. Humphrey*, 9 Pick. 350; R. S., ch. 62, § 6, and commissioners' note; Gen. Stats., ch. 91, § 6; *Sparhawk v. Sparhawk*, 10 Allen, 155, 156. And "all beneficial devises, legacies and gifts, made or given in any will to a subscribing witness thereto, shall be wholly void, unless there are three other competent witnesses to the same." Gen. Stats., ch. 92 § 10.

It is admitted that a wife cannot be deemed a competent witness to a will containing a valid devise to her husband. But it is contended that, within the reason and effect of the section last quoted, a devise to her husband is a beneficial devise to her, and is therefore void, leaving her a competent attesting witness to the will, and the will itself valid in all other respects. And this position, though doubted by a majority of the supreme court of Connecticut in *Fortune v. Buck*, 23 Conn. 1, is supported by earlier decisions in New York and Maine. *Jackson v. Woods*, 1 Johns. Cas. 163; *Jackson v. Durland*, 2 id. 314; *Winslow v. Kimball*, 25 Me. 493.

But with great respect for the learning and ability of the courts which made those decisions, and after carefully weighing the arguments in support of the construction contended for, we are unanimously of opinion that it is founded rather upon a conjecture of the unexpressed intent of the legislature, or a consideration of what they might wisely have enacted, than upon a sound judicial exposition of the statute by which their intent has been manifested. The only devises which the statute declares to be void are beneficial devises to a subscribing witness. It does not avoid even a devise to a subscribing witness, which gives him no beneficial interest, as, for instance, a devise to an executor, for the exclusive benefit of other persons. *Wyman v. Symmes*, 10 Allen, 153; 1 Jarman on Wills, 65. It does not avoid any devise to and for the benefit of any person other than a subscribing witness, even if a subscribing witness would incidentally take some benefit from the devise. In order to maintain the position contended for, it would be necessary to declare void, not merely the interest which the wife, who was a subscribing witness, would take, by way of dower or otherwise, in the property devised to her husband, but also the whole devise to and for the benefit of the husband himself, who was not a subscribing witness, and whose estate the statute does not assume to reach.

Our conclusion is fortified by a consideration of the history of the legislation upon this subject in England and in this commonwealth.

The English statute of frauds required wills devising lands to be attested and subscribed in the presence of the devisor by three or four credible witnesses. Stat. 29 Car. II, ch. 3, § 5. And that provision was re-enacted here in the first year of the Province. Prov. St., 4 W. & M. (1692-3), ch. 15, § 3; 1 Mass. Prov. Laws (State ed.), 46; Anc. Chart. 235.

In *Holdfast v. Dowsing*, 2 Stra. 1253, where a testator charged all his estate, real and personal, with legacies to one of the subscribing witness and to his wife, and with an annuity to the wife, the court of king's bench held that the statute of frauds certainly meant that the "credible witnesses" should not be such as claimed a benefit by the will; and that, even if the tender to the husband, at the trial, of the amount of the two legacies, would remove the objection on that ground (which the court thought it would not), yet the charge upon the real estate of the annuity to the wife made the husband an incompetent witness. Although the doctrine as to the legacies has been since controverted in England, upon the ground that the competency of the witnesses was to be determined at the time of the proof, and not at that of the execution of the will, the incompetency of either husband or wife to be a witness to a devise to the other, which the witness could not release, has never been doubted. *Windham v. Chetwynd*, 1 Burr. 414, 424; S. C., 1 W. Bl. 95, 100; Bul. N. P. 265. The case of *Holdfast v. Dowsing* was taken by writ of error to the exchequer chamber, and after argument and before judgment there was compromised by the parties; and gave occasion to the Stat. of 25 Geo. II, ch. 6; 1 W. B. 8; 1 Ves. Sen. 603; 2 Bl. Com. 377. The reason of this, as stated by Sir William Blackstone in his commentaries, was, that the determination in the king's bench "alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom that depended upon devises by will;" because it "would not allow any legatee, nor by consequence a creditor, where the legacies were charged on the real estate, to be a competent witness to the devise."

The statute of 25 Geo. II, chapter 6, accordingly provided, in section 3, that to the execution of wills already made any attesting witness to whom any legacy was given, whether charged upon lands or not, might be admitted as a witness, upon payment, release or tender of his legacy; and, by sections 1 and 2, that in future wills any attesting witness "to whom any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate" (except charges on lands for payment of debts) "shall be thereby given or made," should be admitted as a witness to the will, within the intent of the statute of frauds, and "such devise, legacy, estate, interest, gift or appointment shall, so far only as concerned such person attesting the execution of such will, or any person claiming under him, be utterly null and void;" and that

charges of debts upon lands should not make any creditor an incompetent witness. All these provisions were re-enacted in our statute of 1783, chapter 24, sections 11-13; and the provision of statute 25 Geo. II, chapter 6, section 3, and statute 1783, chapter 24, section 13, for removing the interest of a witness by payment, release or tender, was omitted in the revision of our statutes in 1836. But neither the statute of 25 Geo. II, nor the statute of 1783, contained any provision as to devises to the wife or husband of an attesting witness, notwithstanding the general attention which had been called to the subject by the case of *Holdfast v. Dowsing*.

In 1822, a case was brought before the court of king's bench, in which a testator devised, upon the determination of an estate for life, an estate in fee to the wife of one of the attesting witnesses, and the wife died before the determination of the life estate. It was argued that, if before the statute of Geo. II the husband would have been an incompetent witness, the clear intent of that statute was to restore the competency of the attesting witness in all cases of benefit arising to him under the will, and to avoid the will "so far only" as concerned the person attesting the execution, or any person claiming under him; and since that statute, therefore, no will could be void by reason of interest arising under it to any attesting witness, further than regarded the interest of such witness or any person claiming under him; and consequently the will was duly attested. To which it was answered that the statute of Geo. II applied only to cases where the interest taken under the will was destroyed by the statute itself; that the husband took no estate or interest under the will; that his wife, indeed, took an estate under the will, and by operation of law he in right of his wife derived a beneficial interest from that estate, which they might have sold during her life, and which would have given him an estate by the curtesy if she had survived the life tenant; but that the estate of the wife was not destroyed by the statute, and consequently the derivative beneficial interest, which the husband took in right of his wife only, was not extinguished; and that, independently of the question of interest, it was a general rule that a husband or wife could not in any case be a witness for the other, as was held in *Davis v. Dunwoody*, 4 Term. R. 678. And the court was of opinion that the will was not duly attested. *Hatfield v. Thorp*, 5 Barn. & Ald. 589. The point thus adjudged upon the application of the statute of Geo. II is summed up by Mr. JARMAN as follows:

"That it applied only when the witness took a direct interest under the will, and not when it arose consequentially. Thus, in *Hatfield v. Thorp*, where one of the three attesting witnesses to a will was a husband of a devisee in fee of a freehold estate, and would, *jure uxoris*, have derived an interest in the lands, it was held that the devise was not within the statute, and, consequently, that the attestation was insufficient." And such continued to be the law of England until 1837, when the statute of 1 Vict., chapter 26, extended the disqualification to take beneficially under the will to the husband or wife of the attesting witness. 1 Jarman on Wills, 65-67. In neither of the revisions of our own statutes in 1836 and 1860, is any express provision introduced upon this point. R. S., ch. 62, § 6; Gen. Stats., ch. 92, § 6. And the statutes removing the objections to the competency of witnesses on the grounds of interest and of the relation of husband and wife are expressly declared not to apply to attesting witnesses to a will or codicil. Gen. Stats., ch. 131, § 15; Stat. 1870, ch. 393, § 2.

The result is, that the decree reversing the decree of the probate court is to be affirmed, and the

Will not admitted to probate.


CARPENTER, plaintiff, v. FARNSWORTH.

(106 Mass. 561.)

Bank check — when check of principal and not of agent.

A bank check, with the words "Ætna Mills" printed on the margin, was given in payment of a debt due from the mills, and signed by F., the treasurer. *Held*, that it was the check of the mills, and not the personal check of F. (*See note, p. 362.*)

ACTION on a bank check, of which the following is a copy:

ÆTNA MILLS.	\$19.20.	"THE BOSTON NATIONAL BANK. BOSTON, <i>September 9, 1869.</i> } Pay to L. W. Chamberlain or J. E. Carpenter or order nineteen dollars  "I. D. FARNSWORTH, Treasurer."
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Carpenter v. Farnsworth.

The case was submitted on facts agreed, as follows: "The *Ætna Mills* owed Chamberlain \$19.20, for an order accepted by them payable to him or order, and Chamberlain indorsed the order to the plaintiff, who requested the defendant to pay it, whereupon the defendant, who was the treasurer of the *Ætna Mills*, and authorized to sign checks for them, gave the plaintiff the check declared on. The Boston National Bank refused payment of the check, and due notice thereof was given to the defendant."

J. E. Carpenter, pro se, cited *Tucker Manufacturing Co. v. Fairbanks*, 98 Mass. 101; *Seaver v. Coburn*, 19 Cush. 324; *Hills v. Banister*, 8 Cow. 81; *Fiske v. Eldridge*, 12 Gray, 474; *Haverhill Insurance Co. v. Newhall*, 1 Allen, 130.

W. P. Walley, for defendant.

GRAY, J. The writing sued on being payable in the alternative to either of the persons named or order, would seem not to be a negotiable instrument. *Osgood v. Pearsons*, 4 Gray, 455. But it is immaterial whether it is or not. If it is, the question who is liable thereon as drawer must in all cases be determined from the instrument itself. *Tucker Manufacturing Co. v. Fairbanks*, 98 Mass. 101, 104, and authorities there cited. If it is not, there is nothing in the circumstances under which it was made to show an intention to charge the defendant personally, for it is admitted to have been given in payment for a debt of the *Ætna Mills*. And accordingly the only ground upon which the plaintiff seeks to charge the defendant is, that he appears upon the face of the paper to be the drawer thereof.

But we are of opinion that this case does not fall within that class, to which all those cited for the plaintiff belong, in which the name of the principal appears upon the instrument by way of mere designation of the general relation which the signer holds to a corporation; and that this check manifests upon its face that the writing is the act of the principal, though done by the hand of an agent, or in other words, that it is the check of the *Ætna Mills*, executed by Farnsworth as their treasurer, and in their behalf.

The case is not distinguished from those in which similar instruments have been held by this court to be the contracts of the principal only. The court has always laid hold of any indication on the face of the

paper, however informally expressed, to enable it to carry out the intentions of the parties. In *Tripp v. Swansey Paper Co.*, 18 Pick. 291, a draft not naming the principal otherwise than by concluding "and charge the same to the Swansey Paper Company, yours respectfully, Joseph Hooper, Agent," was held to be the draft of the company. In *Fuller v. Hooper*, 3 Gray, 334, a draft with the words "Pompton Iron Works" printed in the margin, and concluding "which place to the account of Pompton Iron Works, W. Burt, Agent," was held to bind the proprietor of the Pompton Iron Works; and in *Bank of British North America v. Hooper*, 5 Gray, 567, in which a draft concluding "and charge the same to account of Proprietors Pembroke Iron Works, your humble servant, Joseph Barrell," without otherwise naming a principal or disclosing the signer's agency, was held to bind him only, it was said by the court that in *Fuller v. Hooper* the words "Pompton Iron Works" in the margin of the draft fully disclosed the principal, and that the draft was drawn on his behalf. So in *Slawson v. Loring*, 5 Allen, 340, 343, in which a draft having the words "Office of Portage Lake Manufacturing Company, Hancock, Michigan," printed at the top, was signed "I. R. Jackson, Agent," Chief Justice BIGELOW said: "No one can doubt that on bills thus drawn the agent fully discloses his principal, and that the drawer could not be personally chargeable thereon."

The instrument in question, therefore, binds the corporation, and not its treasurer personally; the judgment of the superior court must be reversed, and there must be

Judgment for the defendant.

NOTE.—See *Sturdevant v. Hull*, post; also, *Means v. Swornstedt*, 3 Am. R. 280 and note 223 wherein the cases are collected; also *Holls v. Petros*, 3 id. 129.—RMR.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

COLB, plaintiff, v. DREW AND WIFE.

(44 Vt. 49.)

Highway — trespass ab initio.

Defendant's wife, under the direction of the highway surveyor, cut the grass growing in the highway over the land of plaintiff, that her children might go and come from school, without getting their clothes wet. She carried the grass away, when cut, and fed it to her husband's horse. *Held*, that although she had a right to cut the grass, yet by carrying it away she became a trespasser *ab initio*.

The owner of the soil over which a highway is located, is entitled to emblements growing thereon, and to the entire use of the land, except the right which the public have to use the land and materials thereon for the purpose of building and maintaining a highway suitable for the safe passage of travelers.

ACTION in trespass. Defendant's wife, under the direction of the highway surveyor, cut the grass growing in the highway over the land of plaintiff, that her children might go and come from school, without getting their clothes wet. She cut about fifteen or twenty pounds and carried it away and fed it to her husband's horse. The court ruled, at the trial, that defendant was justified in cutting the grass in the highway, but that in carrying it away and feeding to the horse, she became a trespasser *ab initio*; and that the rule *de*

minimis non curat lex did not apply. Verdict for plaintiff for one cent damages. Defendants excepted.

G. C. & G. W. Cahoon, for defendants, cited *Hubbell v. Wheeler*, 2 Aik. 359; *Grant v. Knapp*, 40 Vt. 163; *Perry v. Carr*, 42 id. 55. The plaintiff had no right of possession, therefore cannot recover. *Wickham v. Freeman*, 12 Johns. 183; *Cutting v. Cox*, 19 Vt. 517; 1 Chitty's Pl. 200-204; *Ripley v. Yale*, 16 Vt. 261; *Palmer v. Tuttle*, 39 N. H. 486. A justification of the entry will cover the whole declaration. *Kingsbury v. Pond*, 3 N. H. 511; *Warner v. Hoisington*, 42 Vt. 94; also, see *Paul v. Slason*, 22 id. 235; *Fullam v. Stearns*, 30 id. 454; *Graves v. Severens*, 40 id. 640.

Belden & May, for plaintiff.

The public can only use roads for the purposes of travel. Angell on Highways, § 305 *et seq.*; *Perley v. Chandler*, 6 Mass. 454; *Chamberlain v. Enfield*, 43 N. H. 356. The highway surveyor is simply a ministerial officer to expend the money appropriated. Gen. Stats., ch. 25, § 5; *Gassett v. Andover*, 21 Vt. 342; *Clark v. Corinth*, 41 id. 449. But he must not exercise the rights of the owner of the fee: *Felch v. Gilman et al.*, 22 Vt. 38; Angell on Highways, § 304 *et seq.*; *Baxter v. Turnpike Co.*, 22 Vt. 114. The owner of the fee owns the soil of the highway and the crops and emblements thereon. *Goodtitle v. Alker*, 1 Burr. 133; *Woodruff v. Neal*, 28 Conn. 165; *Stackpole v. Healy*, 16 Mass. 33; *Holden v. Shattuck*, 34 Vt. 336. The law gives a remedy for the violation of every private right. *Yates v. Joyce*, 11 Johns. 136; *Ashley v. White*, 2 Ld. Raym. 955. For such a violation damages are presumed, and the maxim "*de minimis non curat lex*" does not apply. 2 Hill. on Torts, 74, 91; *Laflin v. Wilbard*, 16 Pick. 64; *Sturgis v. Laflin*, 11 Vt. 433; *Phelps v. Morse*, 9 Gray, 207; *Paul v. Slason et al.*, 22 Vt. 231; *Fullam v. Stearns*, 30 id. 443.

Ross, J. The only questions arising from the exceptions is, whether the court were correct in holding that Mrs. Drew, if justified in cutting the grass growing in the highway over the land of the plaintiff, that her children might go and come from school, in the highway, without getting their clothes wet, made herself a trespasser *ab initio* in carrying away the grass, and giving it to the horse; and that the rule *de minimis non curat lex* did not apply.

Cole v. Drew.

That the jury must therefore return a verdict for the plaintiff for some sum.

The owner of the soil over which a highway is located is entitled to the emblements growing thereon, and to the entire use of the land, except the right which the public have to use the land and materials thereon for the purpose of building and maintaining a highway, suitable for the safe passage of travelers. This doctrine has been long established by numerous authorities. *Goodtitle v. Alker*, 1 Burr. 122; *Holden v. Shattuck*, 34 Vt. 386; *Perley v. Chandler*, 6 Mass. 454; *Stackpole v. Healy*, 16 id. 33; *Jackson v. Hathaway*, 15 Johns. 447. These authorities fully establish that he may maintain trespass, or ejectment, for injuries to his rights as such owner of the soil. The public acquire only an easement in the land taken, consisting of the right to use the materials, in and upon the land taken, for building and maintaining a suitable way, and of using the way, when constructed, for passing and repassing. The public and the highway surveyor, who is the agent of the public for certain purposes, have no right to appropriate any of the materials or emblements of the land taken to any other purpose. The defendant wife could exercise, under the authority of the highway surveyor, no greater rights than those which the law had conferred on the surveyor.

The grass, though properly cut by Mrs. Drew, under the direction of the highway surveyor, because it interfered with the use of the land for the purposes of a highway, was, when cut, the property of the plaintiff. Mrs. Drew had no right to use it for feeding her husband's horse. By so doing she overstepped the license and authority which the law conferred upon the highway surveyor, and through him upon her, and made herself a trespasser *ab initio*. If a man abuse an authority or license given by law he renders himself a trespasser *ab initio*, as was resolved in the *Six Carpenters' Case*, 8 Coke, 146. She, under the authority and license given by the law to cut the grass, by feeding the grass to the horse, clearly invaded a right still belonging to the plaintiff as the owner of the soil. Such cutting and appropriation of the grass, under the claim of a right by the defendant for fifteen consecutive years, would furnish very strong, if not conclusive, evidence of the acquisition of the ownership of the soil, by the defendant, by adverse use. The right to take the herbage, or emblements, is about all that is left to the owner of soil burdened with the easement of a public highway. When one takes this right from him he appropriates generally the

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only remaining right of the owner of the soil. Such an invasion of a right, we think, always imports some damage, though no pecuniary loss results therefrom. We think *Fullam et al. v. Stearns et al.*, 30 Vt. 443, fully establishes that the maxim, *de minimis non curat lex*, is never properly applied to an injury for the invasion of a right, and it does not apply to this case. The defendants insist that, under the pleadings, if the plaintiff would recover for the appropriation of the grass, he should have never assigned. No such question appears to have been raised in the court below.

Judgment of the county court is affirmed.

McCLARY, plaintiff, v. LOWELL.

(44 Vt. 112.)

Highway — injury to traveler on Sunday.

Plaintiff was traveling from A. to L., a distance of eight miles, on Sunday, to visit his two boys, when he was injured by insufficiency in the highway. In an action against the town, *held*, that a recovery would not be defeated by statute, prohibiting travel on Sunday, except for attendance at places of moral instruction and from necessity. (*See note, p. 367.*)

ACTION to recover damages alleged to have been sustained by insufficiency of a highway in the defendant town. It appears that plaintiff was traveling on Sunday from Albany to Lowell, to visit his two boys, when the injury occurred. The boys lived away from home, as the wife of plaintiff was dead. Defendant requested the court to charge that the right of plaintiff to recover was barred by Gen. Stats., ch. 93, § 3, prohibiting travel on Sunday. The court refused so to charge, but ruled that the statute was no defense. Verdict for plaintiff. Defendant excepted.

W. D. Crane, for plaintiff, cited 4 Cush. 243; *Commonwealth v. Knox*, 6 Mass. 76; *Pearce v. Atwood*, 13 id. 354; 2 Parsons on Contracts, ch. 3, p. 262, a. b. and c., 4th ed.; *Hooper v. Edwards*, 18 Ala. 280, cited in 2 Parsons on Contracts, 262; *Logan v. Mathews*, 2 Barr. 417; *Whitcomb v. Gilman*, 35 Vt. 297.

Benton & Cross, *H. C. Wilson*, and *Powers*, for defendants, cited *Hinckley v. Penobscot*, 42 Me. 89; *Bryant v. Biddeford*, 39

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id. 193; *Jones v. Andover*, 10 Allen, 18; *Lyon v. Strong*, 6 Vt. 219; 1 Hilliard on Torts, 161, 162; *Bosworth v. Swansey*, 10 Metc. 863; *Cratty v. Bangor*, 57 Me. 423.

WHEELER, J. Parents are under moral obligations to attend to the welfare of their children at all times during childhood and youth. These obligations cannot be fully satisfied without personal association and acquaintance when reasonably practicable. They are morally bound to improve all fit opportunities for the discharge of these duties. Both the constitutional and the statutory provisions relating to the observance of the Sabbath, in the laws of this State, were provided for the encouragement of the observance of moral duties on that day, in preference to attention to secular matters. All these provisions were doubtless intended to be harmonious. Section 2 of chapter 93 of the General Statutes, which relates to this subject, permits attendance upon public assemblies held on the Sabbath for the purpose of moral instruction. The necessity provided for in the exceptions to the prohibitions of sections 1 and 3 of the same chapter, is a moral and not a physical necessity. An act which, under the circumstances, is morally fit and proper to be done on the Sabbath is not prohibited by either of these sections. *PARSONS, J., Com. v. Knox*, 6 Mass. 76; *Flagg v. Millbury*, 4 Cush. 243. On this Sabbath the plaintiff was in Albany and his two boys were in Lowell, eight miles distant from him. He could not fully discharge his obligation to them without being where they were. Under these circumstances it was morally proper for him to travel to them. No other facts or circumstances were necessary to show the fitness of this traveling. His duties to his children arose out of his relation to them; the propriety of the journey, out of its necessity to the discharge of his duties. No question appears to have been made at the trial about the existence of these facts, therefore no trial of any question of fact is necessary to determine the legality of the traveling. The traveling, in which the plaintiff was engaged at the time of the injury he is seeking to recover for, was not unlawful, therefore it is unnecessary to determine how his right of recovery would have been affected if the traveling had been illegal.

Judgment affirmed.

NOTE. — See *Myers v. Meinrath*, 3 Am. R. 268, and note thereto, wherein the cases are collected; also, see *Hill v. Wilkes*, 5 id. 540, and *Bradley v. Rex*, 4 id. 394. — REP.

HAGAR, administrator, appellant, v. BUCK *et al.*

(44 Vt. 285.)

Real estate — Lease — Covenant running with land.

A lease of premises contained covenants to the effect that, upon the payment of \$500, the rent should cease and the premises be conveyed to the lessee; that the rent should be paid semi-annually, in April and October, and that if the lessee neglected to build a house and make repairs as covenanted, or neglected to pay rent, the lessor should have the right to enter upon the premises and take possession thereof. The lessee assigned his interest and the assignee went into possession, but neither the lessee nor assignee fulfilled the covenant to build and repair. The rent was paid for four years; in the fifth year the October rent was accepted, but in January following, the lessor entered upon and took possession of the premises, complaining that the building and repairs had not been made as covenanted. In March, the orator, administrator of the assignee who died intestate, tendered the lessor \$500, with the semi-annual rent due the following month, and demanded a conveyance of the premises. The lessor had conveyed the premises to G. a few days previous, and refused to comply with the orator's demand. *Held*, that the covenant to convey, contained in the lease, ran with the land, and was assignable; that the lessor had waived his right to enter and take possession, until the right of the assignee had become valuable; that, if there were any forfeiture, the tender of payment of the \$500, and the accruing rent saved it; and that as G., the grantee, stood in no better position than the lessor, a decree should be entered for a conveyance of the premises to the orator.

BILL in chancery, filed by Hagar, administrator of Mary Ann Turner, against Buck and Griffin. It appeared that defendant Buck, on the 13th of March, 1866, made and delivered a lease of premises to one Meringo, for ninety-nine years. The lease contained covenants to the effect that, upon the payment of \$500, in even sums of \$50, the rent should cease in proportion, and that upon the payment of the whole of that sum, rent should cease altogether, and the lessor would convey the premises by deed of warranty. The rent was \$40 per year, payable semi-annually, on the 13th day of April and October. By the terms of the lease, the lessee was to build a dwelling-house on the premises within two years, and keep the premises in repair, and if he should neglect to build or repair as covenanted, or neglect for the period of two weeks to pay the rent, the lessor should have the right to enter upon the premises and take

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possession and eject the lessee. On the 16th of June, 1866, Meringo assigned his interest in the premises to Mary Ann Turner, and the assignee went into possession ; but neither the lessee nor the assignee fulfilled the covenant to build and repair. The rent was paid for four years, and in the fifth year the October rent was accepted by Buck. But in January, 1871, Buck re-entered upon the premises, for the reason that the building and repairs had not been made as covenanted. In March, 1871, the orator, administrator of the assignee who died intestate, tendered Buck \$500, and \$21 semi-annual rent, due in April, 1871, and demanded a conveyance. Buck refused, having a few days previous conveyed the premises to defendant, Griffin. The orator prayed that a decree be made compelling defendants to convey the land, and that they be restrained from collecting rents. The court decreed *pro forma* that the bill be dismissed. The orator appealed.

E. A. Sowles, for orator.

M. Buck, for defendants.

WHEELER, J. The clause in this lease concerning the reduction of rent and conveyance of the premises is, in effect, a covenant by the lessor that, upon the payment of any part of \$500 in even sums of \$50, the rent should cease in proportion; and that upon the payment of the whole of that sum the rent should cease altogether, and he would convey the premises by deed of warranty. Although this covenant did not bind the lessor to the doing of any thing upon the land itself, it did bind him to that which would affect the estate granted by the lease in respect to the time it should continue, and upon what rent, and by providing for an enlargement of it into an estate in fee. This covenant was a chose in action, and apart from the estate in the land would not have been assignable at law. It could not pass to an assignee so that an action at law could be maintained upon it in the name of the assignee, unless it would pass as a part of and with the estate of the lessee in the land; in other words, unless it would run with the land. Sometimes it has been laid down that a covenant in a lease would not run with the land unless it had reference to something to be done upon the land itself; but this rule does not seem to be strictly correct. In *Bally v. Wells*, as reported in Wilmot's Opinions,

341, COWEN, J., in *Norman v. Wells*, 17 Wend. 136, WILMOT, C. J., said of the running of covenants with the land: "The covenant must respect the thing leased." In *Norman v. Wells* it seems to have been determined—as set forth upon an able and exhaustive examination of many cases upon the subject in an opinion by COWEN, J.—that a covenant, in a lease, touching or concerning the thing demised as affecting the value of the term or of the reversion, or influencing the rent, would run with the land. In *Van Horne v. Crain*, 1 Paige, 455, Chancellor WALWORTH expressly held that a covenant in a lease to convey during the term would run with the land. This covenant respected the thing leased. It affected the value of the term and of the reversion, and influenced the rent. It related to and was connected with the estate in the land granted by the lease. That estate was a medium which would create a privity between any person who should hold it and any other person who should hold the estate of the lessor. It took the quality of non-negotiability away from the covenant, and the covenant "in a waiting, dependent state," would follow it wherever it should go. *Bally v. Wells* (before cited); S. C., 3 Wils. 25. The estate of Meringo in the land, which he took by the lease, was, in common with all estates and interests in land, assignable by our laws; and although assignees were not named in this covenant, the covenant passed by the conveyance of Meringo, with the estate in the land to Mary Ann Turner, and she stood in respect to this covenant as if it had been made directly to her. "Covenants which run and rest with the land, lie for or against assignee at common law, though not named. They stick so fast to the thing on which they wait, that they follow every particle of it." WILMOT, C. J., in *Bally v. Wells* (before cited).

This consideration is sufficient to dispose of the question made by the defendants as to the right of the orator to stand upon this covenant in this suit. But if not, covenants that do not run with the land may be assigned in equity so as to pass the right to enforce them by action in the name of the covenantee to the assignee. 1 Smith's L. C. 179, FIELD, J.; *Willard v. Tayloe*, 8 Wall, 571. An assignee of a chose in action, who has the right to proceed at law upon it in the name of the assignor, has the right to proceed upon it in equity in his own name, in cases proper to be proceeded with in courts of equity. If this covenant had not passed with the estate in the land from Meringo to Mary Ann Turner, his conveyance

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would have operated as an equitable assignment of his interest in it and of his right to enforce it in his name to her; and a suit in equity in his name for such relief as is sought in this case would have been proper. The orator, being the personal representative of Mary Ann Turner, could maintain this suit in equity in his own name, as well as the original covenantee could have maintained it if no assignment or conveyance had been made.

The lessor covenanted by this covenant that he would give the lessee a warranty deed of the premises whenever the lessee should pay him \$500. Such a deed would convey the whole estate of the lessor in the premises to the lessee, free from further obligations on the covenants concerning repairs of buildings or manner of occupation. While the lease should continue in force, and the rent be paid, the lessee, or any one who had his interest and estate, could satisfy all just claims of the lessor to the premises by payment to him of \$500. Upon the testimony, it is plain that neither the lessee nor the assignee of the lessee fulfilled the covenant to build and keep in repair, and that the lessor had the right in a legal manner to enter and put an end to the lease. But the lessor waived this right until the right of Mary Ann Turner, the orator's intestate, to have the premises upon payment of \$500, had become quite valuable. Perhaps by taking the last rent that he took, he did not waive the right to enter for want of repair afterward, although the want of repair at the time he took the rent was substantially the same as at the time of entry. Probably he did not. But if he did not, his entry was made lawful by his taking advantage of a forfeiture which would work a great hardship to the tenant.

Whenever a forfeiture is taken advantage of that works a hardship, and full compensation can be made by the person against whom it is wrought, to the one who has taken advantage of it, courts of equity generally relieve against it, upon the making of such compensation. At the time of this entry, \$500, with the amount of the accruing rent, would have been a full satisfaction of all the claim that the lessor had to the premises, and the payment of that sum and the amount of this rent to him then would have extinguished all his right to the premises, and have saved the forfeiture. In contemplation of law as administered in courts of equity, full compensation could be made for the non-payment of those sums at that time by the payment of interest, or of rent in lieu of interest, upon the sum of \$500. When the orator tendered \$500, with \$21 for the

half year's rent accruing at the time of the entry, and which had not fully accrued at the time of the tender, he offered full compensation to the defendants. No question is made but that defendant, Griffin, a grantee of the lessor since the entry, stands in the same right that the lessor does. Upon the tender, therefore, the orator became entitled to a conveyance of the premises, and to the occupation of them. The orator alleges in his bill that he and the mother of the intestate, who is the heir, have kept possession of the premises, and does not allege that the defendants have received any rents or profits of the premises, therefore no accounting seems to be necessary.

The decree of the court of chancery, which was *pro forma*, is reversed, and the cause is remanded to that court, with directions to enter a decree for a conveyance of the premises to the orator, as administrator, and restraining the defendants by injunction from interfering with the occupation of the premises, or with the rents and profits of them, and directing the payment of the sum tendered to the defendants.

HAYDEN, administrator, plaintiff, v. MERRILL.

(44 Vt. 388.)

Tenants in common. Account.

Where one of two tenants in common enters upon the joint premises and constructs a race-course, which he uses exclusively, and cuts and takes away wood designated to be left growing upon the premises, he is liable as bailiff to account to his co-tenant for the use of the race-course and for one-half of the wood.

ACTION of account. The judgment was rendered *pro forma* for plaintiff upon an auditor's report. The defendant excepted.

The auditor reported in substance that the defendant—a hotel keeper—and Sarah P. Hayden, the plaintiff's intestate, purchased a one hundred acre tract of land which lay near defendant's hotel, each paying one-half the purchase price. At the time, the land was covered with a small growth of pitch pines and brush. It was understood between these persons, at the time, that a portion of said

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lot, and such as might be required, should be appropriated for a race-course for horses — for training, driving and trotting horses — the defendant expecting to aid his business in his public house by means of such course, and profit from the same, and the said Sarah expecting, from what she might derive from the use of said course and from the growth of the wood upon the land, to receive a fair and proper income from her investment in the purchase of the land. No different agreement was made between the parties, further than that a portion was to be appropriated for a course, and the remainder was to be suffered to remain for the growth of wood. After the purchase of the property by said parties, the defendant arranged and made a race-course on said land, using in making the course and appendages about one-half of the land. The land within the circle or course was cleared, and this prevented any growth of wood on the land thus used.

The defendant, after fitting the course, continued to occupy the same up to the time of the sale of said Sarah's interest in the land, which was on the 13th day of January, 1868.

The auditor found that the growth of wood on the part unoccupied by the race-course would be equal to six per cent per annum on the cost of the land, and that defendant had made large gains and profits from the race-course in connection with his hotel, but to what amount was not found; that the part occupied by the course would have produced six per cent per annum from growth of timber had it not been appropriated by defendant. That that sum, after deducting taxes and a fair price for the care of the whole land, would leave \$7.50 per year, with which defendant should be charged.

The auditor did not find that the defendant agreed to pay Mrs. Hayden a particular sum for the use of the course, or the land occupied by the same, but that it was expected by both parties, at the time of the purchase and afterward, that the said Sarah should have a reasonable return for her investment, and that said course should bear its proportion in paying the income.

The auditor did not find that there was any agreement on the part of defendant to pay interest for the annual use of the course; and that he was not, during the time aforesaid, called upon to pay for the use of the course, or any interest thereon, but that in the matter of accounting it is just and equitable that defendant should pay for the use of the same, and interest thereon as computed.

E. R. Hard, for defendant, cited *Henderson v. Eason*, 9 Eng. L. & Eq. 337; *Peck v. Carpenter*, 7 Gray, 283; *Sargent v. Parsons*, 12 Mass. 153; *Munroe v. Luke*, 1 Metc. 459; Sedg. on Dam. 433, 437, 440; 11 Vt. 122, 214; 26 id. 544.

Stewart & Eldridge, for plaintiff.

PECK, J. The defendant's counsel insists that, upon the facts reported, the defendant is not liable to account to the plaintiff for the use of the land, nor for any part of the wood taken from it by the defendant. The lot of land in question, at the time the parties purchased it, the report shows, was covered with small second-growth pitch pine; and that, according to the understanding between the parties at the time of the purchase, the defendant cleared a portion of the lot, and converted it into a race-course, for training, driving and trotting horses, expecting thereby to increase the business of his hotel, which he was keeping in the vicinity of the lot, and so used it as a source of profit; and the residue of the lot, being about one-half, was suffered to remain as it then was, with a view, in the mind of the parties, to profit by the growth of the wood upon it. This condition of things continued, according to this understanding of the parties, during the tenancy in common. It is for the use of the race-course portion of the lot that the auditor has made the defendant chargeable. In support of the defendant's objection to this claim, his counsel refer to three cases in Massachusetts: *Sargent v. Parsons*, 12 Mass. 153; *Munroe v. Luke*, 1 Metc. 459; and *Peck v. Carpenter*, 7 Gray, 283; and to *Henderson v. Eason*, 9 Eng. L. & Eq. 337, to show that, where one tenant in common occupies the whole or more than his share of the common estate, he is not liable to account to the other therefor, in an action at law by his co-tenant, in the absence of any agreement between them on the subject. The counsel for the plaintiff have referred us to no authorities on the subject. At common law, the appropriate remedy by a tenant in common against his co-tenant, who had received more than his just share, was an action of account against him as his bailiff; but the action would not lie by one tenant in common against his co-tenant, who had occupied the whole or more than his just share, unless the defendant had been by the plaintiff, in fact, appointed such bailiff; and perhaps the same rule applied to a case where one tenant in common had received more than his just share of rents. But, to

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remedy this defect of the common law, the statute 4 and 5 Anne, chapter 16, was enacted, by the twenty-seventh section of which it is provided, "that from and after," etc., "actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff, and receiver; and also by one joint tenant, and tenant in common, his executors and administrators, against the other as bailiff, for receiving more than comes to his just share or proportion; and against the executor and administrator of such joint tenant or tenant in common; and the auditors appointed by the court, where such action shall be depending, shall be, and are hereby empowered to administer an oath and examine the parties touching the matters in question, and for their pains and trouble in auditing and taking such account, have such allowance as the court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be." Our statute is similar, which provides that the action of account may be sustained "by one joint tenant, tenant in common, or coparcener, his executor or administrator, against the other, his executor or administrator, as bailiff, for receiving more than his just proportion of any estate or interest."

The declaration has not been shown us, but we take it for granted that it contains the necessary allegations to bring the case within the statute, as the case has been argued without any question being raised upon that point. The authorities all agree that this statute (4 and 5 Anne) constitutes the receiver bailiff of his co-tenant without special appointment, and without any agreement on the subject; that the action given by the statute is made to depend upon privity of estate between tenants in common, or joint tenants, and not upon privity of contract. The construction of our statute has been to this effect, so far as we have had any decisions on the subject. But, in order to entitle the plaintiff to the benefit of the statute, he must allege specifically in his declaration the facts necessary to bring the case within it. The joint tenancy, or tenancy in common, of the plaintiff and defendant, and the proportions in which they severally hold, must be alleged; and that the defendant has received more than his just share or proportion. This is necessary, in order that the judgment to account may show on what basis or rule of liability the defendant is to account; because a bailiff at common law is answerable, not only for what he has received as such bailiff, but also for what he might have made of

the lands with proper diligence, or as some of the books say, what he might have made without willful fault; but under the statute he is not made liable beyond what he has actually received more than his just share or proportion.

But it is claimed that the statute applies only where one tenant in common receives something, as rent, or otherwise, from some third person, for or on account of the premises; that one tenant in common occupying the whole, or more than his share of the premises, and thereby receiving more than his share of the issues and profits thereof, is not liable to account for the surplus to his co-tenant. If the statute in the one case makes the tenant in common receiving more than his share as bailiff of his co-tenant by operation of law, by reason of privity of estate, without privity of contract, it is difficult to see why it does not in the other. *Sargent v. Parsons*, 13 Mass. 149, cited in support of the defendant's proposition, was an action of account between tenants in common; but it was decided upon the principles of the common law, independent of any statute. The statute of Anne was never enacted in Massachusetts, and the court held in that case that the action was not brought upon that statute, and, therefore, that it was immaterial whether that statute was in force there by user or not. In *Munroe v. Luke*, 1 Metc. 459, which was an action of assumpsit by a tenant in common against his co-tenant, to recover the plaintiff's just proportion of rents which the defendant had received of a lessee of the premises, under a lease executed by the defendant as sole lessor, without any privity of contract between the plaintiff and the defendant, or between the plaintiff and the lessee, the plaintiff. The question did not arise whether the defendant could have been held liable by having occupied the premises himself. The other case cited by defendant's counsel, *Peck v. Carpenter*, 7 Gray, 283, was an "action of contract," by one tenant in common against his co-tenant, of a farm, who had had the sole possession during the whole tenancy in common, taking from it all the crops, and receiving all the profits. The case is briefly disposed of by the court, upon the ground that "no remedy is given by the common law" "to recover for such sole use and occupation," and adding, that "it is only when a tenant in common has received in money more than his share of the rents and profits of the common estate, that an action at law can be sustained in this commonwealth by his co-tenant to recover the surplus." In reference to this case, and *Munroe v. Luke*, 1

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Metc., already mentioned, it is to be considered that before either of these decisions the action of account had been expressly abolished by statute (R. S., ch. 118, § 43), with a provision that, where the nature of an account is such that it cannot be conveniently settled in an action of assumpsit, it may be done by bill in equity.

It is obvious that these Massachusetts cases can have but little if any bearing upon the construction of the statute of Anne, or of our statute, in reference to the action of account. In *Wheeler v. Horne*, Willes, 208, the declaration averred that the defendant was bailiff of the plaintiff of one-twelfth part, undivided, of the premises described, from April 1, 1720, to October 1, 1734, and received the annual profits thereof for all that time, to render a reasonable account therefor to the plaintiff when, etc. The defendant pleaded that he never was bailiff or receiver of the plaintiff in manner and form, etc., on which issue was joined. The plaintiff proved that he and defendant were tenants in common of the premises; plaintiff of one-twelfth, and the defendant of eleven-twelfths, for the time alleged, and that the defendant had been in possession of and lived upon the premises, and took to his own use during all that time all the issues and profits of the whole twelve parts, about £8 a year, and refused to account with or pay the plaintiff her share; but did not prove that she had ever appointed the defendant her bailiff of her twelfth part. Verdict subject to the opinion of the court. The court held that the plaintiff was not entitled to judgment, for the reason that the declaration not alleging *that the parties were tenants in common*, the bailiff set forth in the declaration must be intended to be a bailiff by *appointment*, and must be so proved. As the case showed nothing received by the defendant except by his own personal occupancy of the premises, if, as the defendant claims, that is not such a receipt as comes within the statute, or renders a tenant in common liable, it is singular that WILLES, Ch. J., in the full exposition he gave of the statute of Anne on this subject, as to what was necessary under it, and at common law, to render a tenant in common liable to account, did not allude to this defect in the proof as an objection to the plaintiff's recovery. Had it not been considered in that case that a receipt by the defendant of more than his just share by his personal occupancy was of a character, so far as that point was concerned, to bring the case within the statute, the objection can hardly be supposed to have escaped observation. In *McMahon and wife v. Burchell et al.*, 2 Phillips, 127 (22 Eng. Cl.

R. 125), this question is alluded to, and some observations are made by Lord Chancellor COTTENHAM adverse to the proposition that one of several tenants in common by mere occupancy, without contract, unaccompanied by exclusion, is rendered liable to account for rent to his co-tenants; but the remarks must be taken to have reference to the particular circumstances of that case; as he says, there may, no doubt, be various modes of occupation which would make the party occupying liable for rent to the other tenants in common. But the case finally turned on another point; that is, that the claim for rent set up by the defendant against the orators, whether valid or not, was not a proper matter of inquiry or offset in that suit, which was brought merely for the recovery of legacies. About the same time the question arose in *Henderson v. Eason*, 15 Simons, 303 (28 Eng. Ch. R. 303). This was in 1846. The suit was in chancery for the settlement of the testator's estate. The defendant, Eason, was the brother and executor of the testator, and had suffered the testator for several years before and down to the time of the testator's decease, to continue in the exclusive occupation of a farm, of which they were tenants in common in equal portions, without receiving or demanding any rent or other remuneration from him. The question was whether the defendant was entitled to retain out of the testator's estate a moiety of what the master had found to be a fair occupation rent for the entire farm for the time in question. Sir LANCELOT SHADWELL, vice-chancellor of England, decided that under the statute 4 and 5 Anne, the defendant would have had a right to bring an action of account against the testator; and that he would be entitled to bring the like action against the personal representative of the testator, had he not himself been such representative; and, therefore, the master was right in allowing, as he did, a fair occupation rent. The chancellor, however, on appeal, "*doubted whether the claim should have been allowed until the petitioner had established his right at law*;" and, therefore, ordered him to bring an action at law, requiring the orators in the bill in chancery to admit, for the purposes of the action at law, that they were the executors of the testator. Id. 305.

Such action was brought, an action of account under the statute 4 and 5 Anne, chapter 16, section 27, *Eason v. Henderson*, 12 Ad. & El. 986 (64 E. Com. L. 984), and argued in the court of queen's bench; and after being held for advisement, it was decided, Lord DENMAN, chief justice, delivering the opinion of the court, that the

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defendant, the tenant in common thus occupying, and thereby receiving more than his just share, was bailiff of the plaintiff and bound to account; and that for this purpose it is not necessary that the defendant should receive rent of another for the use of the premises. The lord chancellor subsequently directed another action of account to be brought, not being satisfied with the decision of the court of queen's bench, which was brought accordingly, and tried before COLERIDGE, J., when the same facts appeared, with the additional fact that the premises were worth £300 *per annum* to let. The decision being the same as in the former case, a bill of exceptions was tendered on behalf of the defendant, and the case was heard in the exchequer chamber, before three barons of the court of exchequer, and three judges of the common pleas, and judgment rendered reversing the judgment of the queen's bench, upon the ground, to use language of PARKE, B., that "this provision of the statute applies only to cases where one tenant in common receives the money, or something else, from another person, to which both co-tenants are entitled, simply by reason of their being tenants in common, and in proportion to their interest as such, and of which the one receives and keeps more than his just share, according to that proportion," and again, that "in taking all the produce, he cannot be said to receive more than his just share and proportion to which he is entitled as tenant in common, as he receives in truth the remuneration for his own labor and capital, to which a tenant has no right." No case is to be found in our reports in which such narrow construction has been put upon our statute on this subject, but so far as any inference can be drawn from cases that have arisen under it, it is in favor of a more liberal construction. In *Wiswell v. Wilkins*, 5 Vt. 87, which was an action of account between tenants in common, it appeared that while Burton owned the premises, consisting of houses and lands, the plaintiff levied an execution upon one undivided half; and the defendant and those under whom he claimed, at the same time levied upon the other undivided half, by virtue of executions against Burton; that the defendant had for many years enjoyed and occupied the whole premises, taking all the profits thereof to himself; that the levies were all defective; but Burton, the execution debtor, never objected to, but acquiesced in the levies, the statute of limitations having run against him in favor of the levying creditors. The plaintiff claimed in the county court that upon the proof of such title and possession, the defendant should

be legally regarded as a tenant in common with the plaintiff, but the court decided that the evidence offered would not entitle the plaintiff to a verdict, unless it were also proved that the defendant had enjoyed and occupied the moiety claimed by the plaintiff by *contract or license* of the plaintiff, and in subjection to his supposed title; and directed a verdict for the defendant. The supreme court could not have reversed the judgment in this case, if the receipt of more than his just proportion by one tenant in common, by means of his occupancy, would not bring the case within the statute. But the court did reverse the judgment, holding that although the defendant occupied under no agreement with the plaintiff, the plaintiff's title, as well as the defendant's, had been perfected by such occupancy, and that the defendant was liable to be called to account by the plaintiff. It does not appear that the attention of the court was called to this precise question, but if the decision is not an adjudication of the question, it is at least an instance of a practical construction of the statute, contrary to that now claimed by the defendant's counsel. When an English statute, which has received a known and settled construction, is enacted in this State, it is generally to be presumed that the legislature intended to adopt it with such settled construction. Whether the difference in the language of our statute from that of the English statute is deserving of any consideration, it is unnecessary to say. This question of construction of the statute of Anne having but so recently arisen in England, and upon which there is such a difference of opinion there, between the different courts and judges, we do not feel bound to adopt the narrow construction held to in *Henderson v. Eason*. It is too recent to be absolutely binding as an authority for construing our statute, so long in force before that decision was made; especially when we have reason to believe that the broader construction adopted by the court of queen's bench, in *Eason v. Henderson*, as there qualified and elucidated in the opinion of that court, delivered by Lord DENMAN, chief justice, is more in harmony with the practice under our statute, and calculated more fully to cure the mischief or supply the defect of the common law, and thereby more completely to accomplish the purpose of the statute.

There are cases, undoubtedly, where one tenant in common, who has occupied the common property to some extent, and the other has not, where the former would not be accountable to the other for such occupancy. As if two own land in common, peculiarly

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adapted to and used for pasturage, yielding abundant herbage for both, and one turns in his cattle, but not enough to consume his proportion of the grass, and the other neglects to appropriate his proportion of the herbage to any use, voluntarily suffering it to go to waste; or, if two own arable land in common, and one, without any detriment to the land, cultivates his proportion, leaving the residue equally good, for his co-tenant to occupy, who suffers it to lie vacant; or, if the common property consists of two dwellings of equal worth and convenience, and one tenant in common occupies one, and leaves the other for his co-tenant to occupy if he will, who neither occupies nor puts it to any use; in such case it might not be legal or just that the tenant who occupies should be made to account to the other; not because the benefit he has received is not of a kind that comes within the statute, but because he has not received "*more than his just proportion of any estate or interest,*" and it was the folly of the other that he did not receive as much. There may be cases where one tenant in common may be in the technical or nominal possession of the whole premises, not needed for his use, the occupancy being more for the preservation and care of the property, than benefit to such occupant, and not interfering with an equal occupation by the other, when it would be unjust to compel him to pay for such occupancy; as in case of a wharf in one of the cases referred to by the defendant's counsel, where the defendant only occasionally used it for landing his own goods, not interfering with a like, or any proper use to which his co-tenant might have applied it at the same time. On the contrary, suppose the premises consist of land peculiarly adapted to the growth of grass for hay, and one tenant in common has the sole occupancy of the whole, and annually, at a profit, cuts and sells, or consumes the hay, there is no apparent reason why he should not account to his co-tenant for what he has received more than his just proportion. There is no insurmountable difficulty in such case, as is supposed by PARKE, B., in *Henderson v. Eason*, in determining to what extent the benefit received is attributable to the labor and industry of the occupant, and to what extent to the use of the land. The fact that in some cases it would not be just to hold the tenant occupying without contract to account to his co-tenant, is no reason why he should not be liable in any case. There is no danger of injustice from such liability where the statute makes the tenant liable only

"for receiving more than his just proportion," which is to be determined by the facts in each particular case.

We will not attempt to lay down any particular rule as a general test of liability of one tenant in common occupying the common property. But it is safe to say that where, as in this case, the occupancy of one tenant in common is beneficial, and at a profit to such occupant, and is entire and exclusive, he is bound to account to his co-tenant for what he has received by such occupancy more than his just proportion. That the occupancy by the defendant was to him beneficial, and at a profit, is found by the auditor. It also appears that this occupancy by the defendant was not only entire and exclusive in fact, but that from the peculiar purpose to which he fitted and applied it, it was necessarily and intentionally exclusive of any use or occupancy by the plaintiff. It is true that the race-course occupied by the defendant did not embrace the entire premises, but in effect the defendant's occupancy was entire, as it was agreed in the outset by the parties that the residue should remain for the growth of the young wood upon it, and it did so remain to their common profit; so that it cannot be said that the plaintiff might or should have taken her proportion by occupancy of that part of the premises. The defendant's occupancy was also entire in point of time, extending through the whole period of the tenancy in common; thus depriving the plaintiff of receiving her proportion by occupying her share of the time. The facts rebut the presumption that it was expected that the parties were to equalize their benefits by alternating in the possession.

We think, further, that the fair construction of the report, taking it altogether, is, that from the beginning it was the mutual understanding between the parties that the defendant should account to the plaintiff, on some just and equitable basis, for the use of the part of the premises he appropriated to a race-course. If this is so, it obviates the technical objection to the action on which the defendant relies. As the profits, which the auditor finds the defendant received by admission of persons, teams and horses upon the ground, could not be ascertained, and as the main portion of his profits derived from the race-course was by the increase of business it afforded at his hotel, and, therefore, not capable of definite computation, the auditor took a just and sensible view in arriving at the amount which the defendant ought to pay for such use, and has

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come to a conclusion manifestly just, and which is most in harmony with the original expectation of the parties.

The case has been thus far treated as if the whole question, as to the liability of the defendant to account, was open upon the auditor's report. Generally, in an action of account, the judgment to account is conclusive of the defendant's liability to account, and the auditor is to examine the items and report the amount either party is in arrear. Therefore, if in this case it is necessary, as the defendant's counsel claims, that an agreement by the defendant to account should be proved, the judgment to account in this case would seem to be conclusive against the defendant of the fact of such agreement; but, independent of this point, we hold the plaintiff is entitled to recover. We see no error in the allowance of interest. It is objected that the auditor has erred in allowing the whole item of \$17.67 against the defendant for wood taken by him from the premises, when he should have allowed but half of it. If that is the value of the whole wood taken by the defendant, there is such error. As no explanation is given to the contrary, one-half of that item must be deducted.

Judgment reversed, and judgment for the plaintiff for the amount found due by the auditor, less one-half of the aforesaid item of \$17.67.

Judgment accordingly.

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KELLOGG, plaintiff, v. PAGE, State treasurer.

(44 Vt. 356.)

Legal tender act. Payment of State bonds.

In 1870 the legislature of Vermont authorized the State treasurer to pay, in gold coin, bonds issued before the passage of the "legal tender" act of the United States congress of 1861-2, and due in 1871. Subsequently, the supreme court of the United States decided that the legal tender act applied to debts contracted before as well as after its passage; and the State treasurer refused to pay the bonds in gold coin. *Held*, that the payment of the bonds in gold could not be enforced.

PETITION for mandamus. The opinion states the case.

Loyal C. Kellogg, pro se.

W. G. Ferrin and Heaton & Reed, for respondent.

REDFIELD, J. This is a petition for mandamus. The relator avers in his petition that, on the 22d day of November, 1870, he was, and ever since has been, the lawful holder and bearer of four bonds of the State, legally authorized and executed, amounting in the whole to the sum of \$3,000, with interest, and issued before the passage of the "legal tender act," so-called, which was enacted by the congress of the United States, and approved February 25, 1863; and became payable in the year 1871. That, at the October session of the legislature of this State, A. D. 1870, a joint resolution of the senate and house of representatives was passed, entitled "Joint resolution relating to paying in coin certain debts of the State of Vermont," wherein it was resolved "that the treasurer of the State be authorized to pay, in coin, the bonds which shall become due in 1871, and the interest thereon, which were issued before the passage of the 'legal tender act' of the congress of the United States, and to carry into effect the provisions of this resolution, the treasurer is authorized to purchase gold coin in such quantity as shall be necessary for the purpose aforesaid." That he demanded the coin, in payment of such bonds, at the proper time and place, and was refused; the treasurer offering to pay the same in treasury notes, commonly called greenbacks. That, on the 1st day of June, 1871, when said bonds became due, and when the coin was demanded, the treasurer had in his hands coin, provided by him under the authority of said joint resolution, sufficient to pay said bonds, and all other bonds of the State falling due at that time; and that the treasurer had paid all the semi-annual interest becoming due on that class of bonds, after the passage of said joint resolution, on the first days of June and December, respectively, A. D. 1870, including the four bonds held by the relator.

The respondent, in his answer, admits that the relator was the legal holder of said four bonds; that they were legally issued, and became due and payable as stated in the petition; and that payment in coin was demanded and refused. The respondent justifies his refusal to pay said bonds in coin upon two grounds:

First. That said bonds were solvable in legal tender notes. And that, at the time said joint resolution was passed, the supreme court

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of the United States, at the city of Washington, had decided, in the case of *Hepburn v. Griswold*, 8 Wall. 603, that contracts entered into *before* the passage of the "legal tender act," must be solved *in coin*. That said decision was made by a divided court. That other cases, involving the same legal question, were on the calendar awaiting the decision of the same court; and it was then doubtful whether the decision of the court in *Hepburn v. Griswold* would stand and remain the law of the land, or be reversed. And that said joint resolution was purposely drawn and designed to give the treasurer *discretionary* power and ability to pay this class of bonds in coin, if the law should continue to require it, and not otherwise. That, in May, 1871, the supreme court of the United States, at the city of Washington, in the cases of *Knox v. Lee*, and *Parker v. Davis*, reversed the rule of law as held in *Hepburn v. Griswold*, and decided that the "legal tender act" of February 25, 1862, did apply to and control contracts made previous, as well as subsequent, to its passage; whereby it became the law of the land that said bonds held by the relator were ever payable in the *paper* currency authorized by said act of congress. And, therefore, the respondent refused to pay said bonds, and the interest thereon, in gold coin, and insists that in doing so he obeyed the will of the legislature, as expressed in said joint resolution.

Second. The respondent insists that said joint resolution was never approved by the governor, nor ever presented to him for approval, and for this reason it has not the force of a legal enactment; and imposes no absolute duty upon the respondent.

The relator insists, in argument, that "both justice and the public interests concur in requiring the payment of a debt in a currency equivalent to or not depreciated below that in which it originated," and that the legislature in "authorizing" the treasurer to pay this debt in coin—the same currency in which it originated—recognized that *duty*.

The very able argument of the learned relator, in the *forum of conscience*, ought to be satisfactory to any mind. And very good reasons, as I think, could be given that no other than gold and silver, under the constitution, was intended to be the legal currency of the government. The relation of debtor and creditor; of capital and labor; the growth and stability of commerce; in short, the whole material fabric of the State is so interwoven with and dependent

upon a stable and unfluctuating currency, that no considerate mind doubts its importance and necessity.

But it is the high prerogative of the supreme court of the United States to determine the limitations of the laws of congress; and declare their harmony or conflict with the constitution. The subordination and respectful deference to all other courts within the national jurisdiction, to the adjudication of *these* questions in *that* court is a *duty*; because such adjudication is the law of the land. The judgment of the national court of last resort, in May, 1871, that all debts, whether created before or after the passage of the "legal tender act," were payable in the paper issues authorized by congress, determined and fixed the rule of *legal duty*. And whether loans in gold coin should be solvable in the like, or in depreciated paper, was thereafter to be determined at the *forum of conscience*.

The relator further insists that the language of the joint resolution, though *permissive* in form, is *imperative* in law.

The cases are numerous where courts of the highest authority have held that laws authorizing a public officer, or trustees under a charter, to do an act, imposes upon them an imperative duty. In many other cases of like authority, the courts have held that the ~~same~~ or similar language is not imperative, but conveys a mere discretionary power. It is said in some cases that "*may*" means *must*. But the law has made no new lexicon in this class of cases to give exceptional meaning to words. Like all other statutes, the *intent* and purpose of the legislature is the true guide and criterion of construction. Mr. Smith, in his work on Statute and Constitutional Law and Construction, page 724, has very clearly stated the rule. "It is the general rule in the construction of statutes that the word 'may' in a public statute is to be construed '*must*' in all cases where the legislature means to impose a *positive* and *absolute* duty, and not merely to give a *discretionary power*; but no general rule can be laid down upon this subject, further than that exposition ought to be adopted in this as in other cases, which will carry into effect the true *intent* and *object* of the legislature in the enactment."

If the case at bar is to be determined by this rule, we think its solution is easy. Up to the time of the promulgation of the judgment of the supreme court of the United States, in *Hopburn v. Griswold*, the treasurer had been paying principal and interest of the State bonds in the paper currency provided by congress. At the session of the legislature next after that decision, in October, 1870,

the governor, in his annual message, called the special attention of the legislature to that decision, and urged that provision be made to pay the debt of the State, in accordance with the requirements of law, that no taint might attach to the good faith and credit of the State. If we consider the evidence *aliunde*, the mode and manner in which the joint resolution was drawn, modified and shaped in committee, and the avowed reasons for the form ultimately given it, there can be no doubt that the legislature *intended* merely to authorize the treasurer in his *discretion* to pay this class of debts in *coin*. But we think the joint resolution must be interpreted by the language used, the circumstances existing at the time, and the exigencies that called for its adoption. The *assumption* that the legislature was seized with a sudden repentance and remorse for having paid the creditors of the State in a depreciated currency, and, in virtuous chagrin, resolved thereafter to pay in gold, is assuming for it an abnormal condition, and would require positive *evidence* to establish it. The highest courts in fifteen of the States, including our own, had then decided that all debts could be lawfully paid in this paper issue; and the public conviction that the "legal tender act" had an important agency in crushing an odious rebellion was so deep, that whoever questioned the moral or legal propriety of paying debts in greenbacks, was deemed oblique in morals, perverted in judgment, and wanting in patriotism. It was the *unexpected* decision in *Hepburn v. Griswold*, that *constrained* the action of the legislature. And the public agitation resulting from that judgment, and the agencies at work to change or modify that decision, of which all but moderately acquainted with public affairs were familiar, induced that body to shape the resolution in this *discretionary* form. The legislature *intended* to enable the treasurer to conform to the law as interpreted by the courts, *and so long as that interpretation prevailed, and no more.*

II. At the time the demand was made the relator had no claim, *de jure*, to require payment of his bonds in gold.

The rule is well stated by Chancellor KENT, in *The Newburgh Turnpike Company v. Miller*, 5 Johns. Ch. 112, "that the word *may* means *must*, or *shall*, only in cases where the public interest and rights are concerned; and where the public or third persons have a claim, *de jure*, that the power should be exercised."

Had the relator, on the 1st day of June, 1871, a claim, *de jure*, that his bonds should be paid in gold?

The supreme court of the United States had then solemnly declared that the "legal tender act" was in no degree restrained or limited by the constitution. And, therefore, these bonds could be lawfully paid in paper money, and a *tender* of the sum due in greenbacks would have canceled the bonds. This is not, then, a case where courts have ever construed words *permissive* to be *imperative*. Indeed, "may" never means *must* in law, any more than in philosophy. But when authority is given to exercise a power beneficial to a citizen, and the right to have that power exercised continues and subsists, courts hold that the *duty* to exercise that power is *absolute*, and will make it *imperative*, for such is deemed the *intent* of the legislature. The *right* and the *duty* are correlative.

III. It is claimed that the joint resolution of the senate and house of representatives, without the approval of the governor, imposes no *legal duty* upon the treasurer. This resolution purports to authorize the treasurer to draw money from the treasury. The seventeenth section, part second, of the constitution of this State, declares that "no money shall be drawn out of the treasury unless first appropriated by *act of legislation*." The eleventh section of the articles of amendment declares that "every bill which shall have passed the senate and house of representatives shall, *before it becomes a law*, be presented to the governor," etc. There would seem no ground for claiming that this joint resolution of the two houses has the character of a *legal enactment*. The governor, under the constitution of this State, is a co-ordinate branch of the government, and a necessary party to all "*acts of legislation*." But the court have not considered, and do not decide whether, if the petition was otherwise well founded, relief might not be given.

The writ of mandamus is refused. The petition is dismissed, but without costs.

Petition dismissed.

Derby v. Thrall.

DERBY v. THRALL, appellant.

(44 Vt. 412.)

Promissory note — alteration.

Defendant was surety on a promissory note payable to plaintiff. In drafting the note, the plaintiff's given name was, through a mistake, incorrectly written. After the note was executed, plaintiff, with the consent of the maker, but without the knowledge or consent of defendant, corrected the payee's name. *Held*, not to be a material alteration. (*See note*, p. 390.)

ASSUMPSIT. The facts are stated in the opinion.

R. R. Thrall and *C. H. Joyce*, for defendant.

Dunton & Veazey, for plaintiff.

PIERPOINT, C. J. It appears from the exceptions that the note on which the plaintiff seeks to recover was given for a rifle purchased by one Wilson of the plaintiff; that the defendant signed the note to the plaintiff, as surety for said Wilson; that Wilson procured the note to be drawn, and had it made payable to Franklin Derby, supposing that to be the plaintiff's name, as he was commonly called Frank. After the note had been signed by the said Wilson and the defendant, Wilson took it to the plaintiff, who noticed that it was payable to Franklin instead of Francis E. Derby, the plaintiff's name. Wilson then consented that the plaintiff should alter the name of the payee from Franklin to Francis E., and the plaintiff did so without the knowledge of this defendant.

The defendant now claims that such alteration of the note, without his consent, invalidates the instrument as to him, and discharges his liability. Whether it is to have such effect depends upon the nature of the alteration. Was it a material or an immaterial alteration? The alteration having been made by a party to the note — if it is material it invalidates it, otherwise not.

It appears from the case that the plaintiff is the person to whom the note was given for property purchased of him, and this was understood by all the parties. This defendant knew, when he signed the note, what it was given for, and to whom it was intended to be

made payable. He intended to sign a note payable to the plaintiff, and supposed he had done so. It turned out that Wilson had mistaken the given name of the plaintiff, and he consented that the plaintiff should make the alteration so as to make the note just what Wilson and the defendant supposed it was when they executed it. The change made no alteration in the liability or obligation of the makers. It neither enlarged, diminished nor varied that obligation. There was no change in the party to whom the obligation was assumed. The only effect of the alteration was to correctly describe the party to whom the promise was in fact understandingly made.

This is not like the case of *Broughton v. Fuller et al.*, 9 Vt. 373, relied upon by the defendant. In that case the note was originally given to Ebenezer Broughton (the father). It was subsequently altered by adding the word *junior* to the name of the payee, thus making it payable to another and a different person from the one to whom it was originally understandingly given. Such an alteration was, of course, held to be material, and to invalidate the note.

In the second volume of Parsons on Notes and Bills, page 560, it is said: "Adding the names in full of a firm to a bill drawn by them in the firm name, has been held no alteration, as being in effect only adding the Christian names of the drawees, whose surnames had been affixed to the bill before acceptance. So, if the surname of the payee be interlined subsequent to the delivery, and it be proved that the note was originally given to this payee, the alteration is immaterial. So, where a note made payable to a partnership under one name, is indorsed by a surety, and afterward altered by the maker and payee, without the knowledge of the surety, so as to be to the same firm under another name, the alteration is immaterial, and does not discharge the surety." And various authorities are cited in support of these propositions, and the same author, after a full examination of the cases, draws therefrom the following conclusion: "Wherever neither the rights nor interests, duties nor obligations of either of the parties are in any manner changed, the alteration is immaterial."

Applying these principles to the case before us, it is very clear that the judgment of the county court was right, and must be affirmed.

WILKINSON, plaintiff, v. WAIT.

(44 Vt. 508.)

Exemption laws — Conditional sale — Jurisdiction of State and United States courts — Bankruptcy.

Plaintiff, having two pairs of oxen, sold one pair to L., who took them away on condition that they were to become his when he paid for them. *Held*, that the pair remaining were the *only* pair of oxen plaintiff then owned, and as such were exempt from attachment, and being so exempt, would not pass to the assignee in bankruptcy of plaintiff.

Defendant, a constable, attached property of plaintiff by law exempt from attachment, and subsequently surrendered it under protest to the assignee in bankruptcy of plaintiff. *Held*, that the assignee, having no right to take the property, defendant was liable in trover.

The unexercised jurisdiction of the United States courts over a question does not oust a State court of jurisdiction when the question arises collaterally by way of a defense to an action in which the State has jurisdiction of the parties and the subject-matter.

ACTION for the conversion of a pair of oxen. It appeared that plaintiff, being the owner of two pairs of oxen, sold one pair to Lincoln, who took them away from plaintiff's premises on the condition that they should become his when he paid for them. The pair remaining in plaintiff's possession was attached by defendant, a constable. The pair in the possession of Lincoln were attached by another constable, who drove them away without objection from Lincoln, he having paid nothing on the purchase. While the oxen were in the hands of the officers, plaintiff was thrown into bankruptcy, and an injunction was issued from the United States court forbidding the sale of plaintiff's property, and served upon defendant. Plaintiff's attorney also forbade the sale. The assignee in bankruptcy demanded the oxen in defendant's hands, and defendant gave them up under protest. The assignee sold the oxen for \$323.50, and held the proceeds at the commencement of this action.

The court charged that, if plaintiff had sold the oxen on condition that they were to remain plaintiff's property till paid for, that pair of oxen were not the property of plaintiff within the meaning of the statute exempting one pair of oxen or steers from attachment and execution; that Lincoln had a right to the custody of the oxen, and the remedy of a creditor of plaintiff's was through the trustee process; and that, if they found that the oxen in contro-

versy were the only yoke plaintiff then had beside the Lincoln oxen, plaintiff was entitled to recover.

That, if these oxen were exempt from attachment as the only oxen plaintiff then owned, the assignee in bankruptcy had no right to take them from defendant, because he had no jurisdiction over property that, by the laws of this State, was not subject to attachment for plaintiff's debts, and that if they found that this was the only yoke of oxen plaintiff then owned, defendant was liable for their conversion, and that the measure of damages was the value of the oxen at the time the defendant converted them, with interest thereon to time of trial.

Defendant excepted. Verdict for the plaintiff.

Charles N. Davenport and *A. M. Albee*, for defendant.

Waterman & Reed, for plaintiff.

PROX, J. The jury have found that the pair of oxen in question were the only oxen the plaintiff owned, unless the oxen in Lincoln's possession at the time the defendant attached the oxen in question, were also the property of the plaintiff within the meaning of the statute exempting one pair of oxen from attachment. The jury having also found that the oxen in Lincoln's possession were there under a contract of sale for \$240, by plaintiff to Lincoln, with a stipulation that they were to remain the plaintiff's property till "paid for," the court was right in holding that the pair of oxen attached by the defendant, which were the absolute property of the plaintiff and in his possession, were exempt from attachment, notwithstanding the plaintiff's interest as such conditional vendor in the oxen sold to Lincoln.

The oxen in question being exempt from attachment by our State law, the property in them did not pass to the assignee of the plaintiff in bankruptcy, nor the title of the plaintiff become impaired or affected by the bankrupt act, but is saved from its operation by express provision to that effect. From this, it follows that the assignee had no right to take the oxen; and the defendant was not bound to deliver them to the assignee, and cannot protect himself from this action, nor mitigate the damages, by showing such delivery, even under protest, on demand of the assignee. It is claimed, on the part of the defense, that the United States district court had jurisdiction of the question as to the exemption of this

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property from attachment, and consequently from the operation of the bankrupt law, and that the plaintiff's only remedy is by application to the district court, at least, except for nominal damages for taking and detaining the oxen up to the time the assignee took them from defendant. It is not necessary to pass upon the question of jurisdiction of that court, because the existence of jurisdiction of that court over the question, unexercised, does not oust this court of jurisdiction when the question arises collaterally, as in this case, by way of defense to an action in which this court has jurisdiction of the parties and the subject-matter. The district court has rendered no judgment nor made any order touching the question involved in this case. The injunction issued against the defendant by that court, while he had the plaintiff's property under attachment, forbidding the sale of any of the plaintiff's property by him, was manifestly for the purpose of first determining whether the lien of the attaching creditor was paramount to the right of the general creditors to a *pro rata* distributive share of the property attached. That in no way interferes with the right and remedy of the plaintiff as against the defendant, which rest on ground entirely distinct from that of the relative rights of the creditors of the plaintiff as between themselves under the bankrupt law. We have no occasion to express any opinion as to what the effect would have been upon the liability of the defendant, had it appeared that the assignee took the oxen from the defendant under a special order of the district court; for no such order was made, nor does it appear that any proceedings have been had in that court which can be construed as an adoption or sanction by that court of the act of the assignee in taking the oxen. It appears that the assignee sold the oxen, but that he still holds in his hands the funds arising from the sale. The proposition of the defendant's counsel, that the assignee, of his own motion, without any order of court, had a right to take the property, and compel the plaintiff to abandon his remedy against the defendant, and follow him (the assignee) into the district court, is untenable. Before the defendant delivered the property to the assignee he had become liable to the plaintiff for the taking of the property, and for refusing to deliver it when demanded, and nothing that transpired afterward either defeats the action or mitigates the damages below the value of the oxen at the time of the conversion and interest.

Judgment affirmed.

ABBOTT & Co., plaintiffs, v. DUTTON.

(44 VT. 544.)

Attorney — unauthorized appearance. Audita querela.

One co-defendant may employ an attorney for the other co-defendants, and the appearance of such attorney for all will bind all. If the attorney gives an unauthorized consent that judgment may be rendered against them, the remedy, if there is any other than that against the attorney, is by application directly to the court which rendered the judgment, or by writ of error, and not by *audita querela*.

It seems that an appearance by an attorney binds the party for whom he appears, whether the attorney was employed by the party or not.

Audita querela. The opinion sufficiently states the case.

The verdict was for defendant, to which plaintiffs excepted.

Norman Paul, for plaintiffs, cited *Staniford v. Barry, Adm'r*, 1 Aik. 321; *Dodge v. Hubbell*, 1 Vt. 491; *Stone v. Seaver*, 5 id. 549; *Barrett v. Vaughan*, 6 id. 243; *Hadlock v. Clement*, 12 N. H. 68; *Lovejoy v. Webber*, 10 Mass. 101; *Marvin v. Wilkins*, 1 Aik. 107; *Whitney v. Silver*, 23 Vt. 634; *Johnson v. Murphy*, 42 id. 645; *Blood v. Crandell*, 28 id. 396; *Spaulding v. Swift*, 18 id. 214; *Kidder v. Hadley*, 25 id. 544; *Newcomb v. Peck*, 17 id. 302.

S. E. & S. M. Pingree, for defendant.

Ross, J. An appearance by an attorney binds the party for whom he appears, whether the attorney was employed by the party or not. *St. Albans v. Bush*, 4 Vt. 58; *Spaulding et al. v. Swift*, 18 id. 214; *Newcomb et al. v. Peck et al.*, 17 id. 302.

If the party has any remedy for the unauthorized appearance of an attorney, other than his remedy against the attorney, it is by application directly to the court which rendered the judgment against him on the unauthorized appearance of the attorney, or by a writ of error, and not by *audita querela*. *Spaulding et al. v. Swift*, 18 Vt. 214.

One co-defendant may employ an attorney for the other co-defend-

Abbott & Co. v. Dutton.

ants, and the appearance by such an attorney for all will bind all. *Scott v. Larkin*, 13 Vt. 112; *Spaulding et al. v. Swift*, 18 id. 214; *Whitney & Titus v. Silver*, 22 id. 634. In the last case the court restrict the authority of a co-defendant to employ an attorney for the other co-defendants to a case where the other co-defendants have been duly served with process, and are before the court.

From an inspection of the copies of appeal in the case complained of, it appears to be there certified that the plaintiffs in this suit, the defendants in that suit, accepted service on the writ in that suit, appeared by their counsel on the occasion of the first continuance; appeared and requested the second continuance, and appeared at the time the justice rendered judgment in their favor, from which the plaintiff in that suit, defendant in this, appealed. In addition to these appearances the county court have found that Mr. Collamer appeared for the defendants in that suit, and consented in open court that the very judgment might be rendered against them, of which they now complain.

By the consent of the counsel on both sides, this court was allowed to inspect the docket entry of that case for the May term, 1870, and find there recorded a general appearance of another attorney for the defendants, which appearance was continued to the December term, when the judgment complained of was rendered. Mr. Collamer's name does not appear to have been entered upon the docket as the attorney of the defendants in that case. We do not decide whether his appearance for the defendants generally, and consent that judgment should pass against them, is any the less binding because he did not enter his name upon the docket entry of the case. Being a well known attorney of the court, we are unable to see upon what principle the failure to enter his name for the defendants should make his acts any the less binding. The decision of this case does not render it necessary to decide that question, as there was a general appearance of an attorney before the justice and in the county court. The authorities first cited show conclusively that such an appearance waived any want of service on the defendant Abbott, and rendered that judgment valid and binding upon both Abbott and Brown; at least, so far so, that it cannot be set aside by *audita querela*.

Judgment of the county court is affirmed.

JUDGE OF PROBATE, etc., plaintiff, v. HIBBARD *et al.*

(44 Vt. 507.)

Official bond — action upon laws of other States.

An action cannot be maintained in the courts of Vermont on a bond executed to a judge of probate in New Hampshire to secure the proper discharge of the duties of a guardian, the duties imposed by the guardian's appointment, the obligation created by the bond, and the rights and remedies under it, being all prescribed by the statute of New Hampshire.

ACTION on a probate bond, executed by the defendants to the judge of probate of the county of Sullivan, New Hampshire. The opinion states the case. Judgment for the plaintiff, to which the defendants excepted.

Norman Paul, for defendants.

W. C. French, for plaintiff.

PIERPOINT, C. J. This action is brought upon a bond executed by the defendants to the plaintiff, to secure the faithful discharge of the duties of Eliza Hibbard, one of the defendants, as guardian of one Dennis C. Hibbard, a minor, to which office she had been appointed by the plaintiff. This bond was taken in pursuance of the statute laws of New Hampshire. The duties imposed by the appointment, the obligation created by the bond, and the rights and remedies under it, are all prescribed by the statute of said State.

The questions presented for our consideration arise upon a general demurrer to the declaration. It is insisted on the part of the defendant that no action can be maintained by the plaintiff upon this bond in this State, even if it be conceded that all has been done that is required to be done by the laws of New Hampshire, to enable the plaintiff to maintain such action in that State.

We think there can be no doubt that the instrument declared upon in this case must be regarded as an official bond. It is taken to the "judge of probate," etc. It may be observed that the words "judge of probate" are used in the statutes of New Hampshire as synonymous with the words "probate court" in our statutes. Thus,

Judge of Probate v. Hibbard.

in chapter 161, section 3, or the compilation of 1853, it is said: Every judge of probate in his county has jurisdiction of the probate of wills and of granting administration, etc. In section 4: Such judge shall have jurisdiction in relation to the appointment and removal of guardians of minors, insane persons, etc. This shows that this bond was taken to the officer or tribunal that has the official or judicial authority over the subject-matter to which it relates. It was taken to secure the faithful discharge of the official duties of the guardian, imposed upon her by the appointment to the office of guardian, by the authority to which the bond is taken. This is fully sustained by the case of *Probate Court v. Strong*, 27 Vt. 202. That was an action upon a guardian's bond taken to JOEL ALLEN, judge of probate for the district of Grand Isle. The court held it to be, in legal effect, a bond taken to the probate court of said district, and to be an official bond. It being an official bond, can this action be maintained upon it?

This bond is purely a creature of the statute law of New Hampshire, taken according to its requirements and for a purpose specified and declared by such law. What obligation it creates, and what would be a compliance with its provisions, can only be determined by a reference to that law. When its conditions are broken, the remedy, and the mode of enforcing the remedy, are to be found in the same law. When the parties executed this bond, they did it in view of the obligation thereby created under the laws of New Hampshire, and of the method prescribed to enforce the remedy. The whole proceeding was understood and intended to be local in its operation, and to be consummated in that State, and under its laws. Should we attempt to enforce and carry into effect the law of New Hampshire applicable to the subject, and had the requisite and appropriate judicial machinery for that purpose, we should be quite likely to fall into error, to the prejudice of the parties.

If this bond were sued in the courts of New Hampshire, and judgment rendered against the defendants for the whole penalty of the bond, such judgment would stand as security for all interested, and then, upon a hearing in chancery, the court shall ascertain the claims of the parties whose names are entered upon the writ as prosecutors, and render judgment for the amount, and that the judge of probate have execution therefor for the use of such parties. Such a proceeding is wholly unknown to our system of jurisprudence.

But, it is said this is obviated by the fact that the accounts of the guardian have been settled by the judge of probate, and the amount due fixed and determined, and there can be no further breaches of the bond, and no other claim upon the judgment here. It does not follow, that the amount found due by the judge of probate is the amount now due. Payments may have been made and circumstances may have occurred that would show there was nothing due. There may, also, be other claims upon the penalty of the bond. The guardian, upon her settlement with the judge of probate, may have fraudulently withheld funds of the ward in her hands and not have accounted therefor, for which she might afterward be called to account, and the bond made chargeable with the payment thereof.

We think this case comes within the case of *Pickering v. Fisk*, 6 Vt. 102, where the whole subject is very fully and ably considered by Judge PHELPS, and that the doctrine of that case must govern this.

Other questions were discussed in the argument, that in the view we have taken of the case it becomes unnecessary to consider.

Judgment reversed, and judgment for defendants for cost.

TYLER, plaintiff, v. BEACHER.

(44 Vt. 642.)

Constitutional law. Flowage acts. What is "public use."

A grist-mill owned and operated by individuals who are compelled, by law, to grind well all grain received by them for that purpose, but are not compelled by law to receive grain for grinding, is not a "public" benefit in the constitutional sense; and an act of the legislature authorizing the flowage of lands (on payment of assessed damages), by maintaining a dam of sufficient height to run such mill, is an unconstitutional exercise of the right of eminent domain.

PETITION brought by plaintiff, the owner of a grist-mill situated at the outlet of Island Pond, in Essex county, Vermont, under the Flowage Acts of 1866-9, to have the height to which he may keep his dam, and raise the water in said pond, established, and to have

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defendants' damages therefor assessed. The principal question involved is as to the constitutionality of the Flowage Acts, which is sufficiently stated in the opinion. The commissioners who were appointed to inquire into the case found that the grist-mill was "an undoubted public benefit." Their report fixed the height of the dam and assessed the defendants' damages. Judgment was rendered on the report. Defendants excepted.

Ossian Ray and Henry Haywood, for petitioners.

Geo. N. Dale, for petitioner. When the purpose for which private property is to be taken is of a sufficient public nature, especially if it be also a necessity to the public, then the legislature has a right to appropriate the property of an individual. In the case of *The Boston & Roxbury Mill Corporation v. James Newman*, 12 Pick. 167, we have a case differing from this only in this: That the mill company built a turnpike in connection with the dam, but the right to maintain the dam independent of the turnpike is distinctly recognized and sustained. See, also, *Armington v. Town of Barnet, etc.*, 15 Vt. 745; *Paine v. Leicester*, 23 id. 361; *Livermore v. Town of Jamaica*, 22 id. 44; *Whitingham v. Brown*, id. 317; *Newcomb v. Smith*, 1 Ohand. (Wis.) 71; *Thien v. Voeghtlander*, 3 Wis. 461.

Angell on Water-courses, chapter 12, declares that it is well settled that taking land for mill purposes is sufficiently for the public good to authorize its being done. *Talbot v. Hudson*, 24 Law R. 228; *Wolcott Woolen Manufacturing Co. et al. v. Jacob Upham*, 5 Pick. 292; *French v. The Braintree Manufacturing Co.*, 23 id. 216. See, also, *Great Falls Manufacturing Co. Case*, 47 N. H. 443.

WHEELER, J. (After disposing of a minor point.) The important question in this case relates to the validity of the several acts of the legislature, upon which these proceedings wholly rest. The legislature is limited in its powers by the constitution of the State, and whatever it does in excess of the limits is nugatory. The first article of the first part of the constitution, declares acquiring, possessing and protecting property to be among the natural, inherent and inalienable rights of persons. The second article of the same part declares that private property ought to be subservient to public uses when necessity requires it, but that, whenever taken for the use of the public, the owner ought to receive an equivalent in money.

These declarations together are equivalent to a declaration that private property ought, upon compensation made in money, to be subservient to public uses when necessity requires it, and to no other uses, even though necessity should require it, and compensation should be made.

Whenever the use is public, the legislature has full power to determine whether a necessity for taking for such use in any class of cases exists or not. *Williams v. School District*, 33 Vt. 271. And the legislature has the sole prerogative of determining as to the propriety of exercising the power it has upon the necessity that does exist in any class of cases. But the legislature has not power to so determine that a use is a public use as to make the determination conclusive. The attempt of the legislature to exercise the right of eminent domain does not, therefore, settle that it has the right; but the existence of the right in the legislature, in any class of cases, is left to be determined under the constitution by the courts. The question, whether the taking in this case was for public use, remains, therefore, to be determined here.

The judgment of the county court in this case was, in effect, that the petitioner might raise the water in Island pond to a certain height, and that he should pay the petitionees certain sums of money for the damages which the raising of the water to that height would occasion them by flowing their lands. The acts of the legislature under which these proceedings have been had provide that this assessment of damages shall be final and conclusive on the parties, their heirs and assigns, and give the petitioner, his heirs and assigns forever, the right to keep up such dam as established. Gen. Stats. 1870, 954, § 4. These acts of the legislature provide for flowage in this manner, whenever it would, in the opinion of the commissioners, be of public use or benefit, and the court if required should inquire and be of the opinion that it would be of public benefit. *Id.* 907, § 3; 954, § 3. This judgment of the county court is founded upon a finding by the commissioners, that the grist-mill of the petitioner, for the use of which he desired to raise the water, was of undoubted public benefit, and in that respect it has no other foundation. There is nothing in the case, as it is made up and furnished to this court, to show what the mill of the petitioner is, further than that it is a grist-mill. If it is a mill designed for custom grinding, there is no law to compel him, or his heirs or assigns, to grind for the public, or any part of the public, for any

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fixed toll or compensation, nor for any toll or compensation, unless they choose to do it. The statutes require owners and occupiers of grist-mills to grind well and sufficiently all grain received by them for that purpose, at certain fixed rates of toll, but they are not compellable to receive grain for grinding against their will. Their mills are their own private property, subject to their own control, except as to that regulation, and the public has no rights whatever in them, or to the use of them. If the mill is for grinding grain into flour or meal for sale, it is subject to no control, except the statutes for the inspection and for the regulation of the weights and measures of such productions, and is likewise merely private property. The benefit which the commissioners have found that the raising of this water would, by supplying the petitioner's mill, be to the public, is the benefit which, in their opinion, would result from having the right to flow the land of the petitionees to the extent fixed, appertain to the petitioner in his private business, instead of to the petitionees in theirs. This benefit could not accrue from any use the public would have of the flowage or of the mill, but only from the use the petitioner and his successors might make of them.

Then this benefit, such as it is, is not in any way secured to the public, either by the acts of the legislature or the proceedings in the case. The attempt is not to take the property of the petitionees for the petitioner, for a grist-mill to be held by him and his successors, so long only as they should maintain and operate the grist-mill, but it is to take the right, in the words of the acts, for the petitioner, his heirs and assigns forever, without any express limitation, and without any implied limitation, except that probably the use would be confined to the purposes for which the taking could under the acts be had; that is, for a water-mill or manufactory, and the uses to which it could be put within that restriction, might be for the public benefit in the opinion of the commissioners and court and might not.

The taking attempted by these proceedings would seem upon these views to be a taking of the property of the petitionees for the use of the petitioner, and not of the public.

Acts of the legislature of Massachusetts quite similar to these have been a long time in operation there, and the validity of them seems never to have been much questioned at any time, and seems to have been directly recognized at other times. This consideration on account of the great learning and astuteness of the bar,

and ability and uprightness of the courts there, would have great weight in determining the validity of these acts, if there was not any thing material in relation to the question applicable to those acts, and not equally applicable to these. But those acts were adopted there by the provincial legislature, while that body probably had all the power that the British parliament would have had over like subjects, and long before there was any State constitution there. The power of that legislature was not limited in this respect by any written constitution, and under the circumstances under which the laws were passed, the validity of them could not probably well be questioned, and was probably recognized by all. When the State constitution was adopted there, these laws were in force. That part of the constitution of that State, relating to this subject, was embodied in article 10 of part first, which part treats of the rights of the people and the purposes of government. That article commences by declaring that each individual has a right to be protected by government "in the enjoyment of his life, liberty and property, according to standing laws." The provisions in relation to the subserviency of private property to public uses immediately follow this. Those provincial acts were then standing laws, and the constitution may well have been thought by this declaration to have recognized the validity of them, the same as trials by modes other than by jury, in use at the time of the adoption of a constitution, have been held not to be abrogated by provisions in the constitution, guaranteeing the right to trial by that mode. *Plimpton v. Somerset*, 33 Vt. 283. In *Boston and Roxbury Mill Corporation v. Newman*, 12 Pick. 467, the history of those acts was traced back to their provincial origin, and their validity treated as resting back upon the original foundation of them. The decision in that case, however, did not stand upon the validity of those general acts, but upon that of a special one which created a corporation for the purpose of erecting an extensive dam that would serve for a turnpike road, and at the same time furnish an immense water power near to a great city, where both were much needed, and authorizing the taking of private property for those purposes.

In *Williams v. School District*, before cited, and before any of these acts were passed in this State, POLAND, J., said of the general flowage acts of Massachusetts, that it seemed to him that they stepped "to the very verge of constitutional limit, if not beyond."

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The decision of the majority of the court, in *Newcomb v. Smith*, 1 Chand. (Wis.) 71, followed the practice and decisions in Massachusetts, and appears to have been made largely upon their authority. And, of the five judges who composed that court, Stow, C. J., and LARABEE, J., dissented, and LARABEE, J., reported a dissenting opinion, that the proceedings were unconstitutional, in which the chief justice concurred. *Thien v. Voeghilander*, 3 Wis. 461, merely followed *Newcomb v. Smith*, without any reported discussion. These cases from Massachusetts and Wisconsin seem to be much relied upon to support these proceedings in this case.

Decisions from Virginia, North Carolina, Kentucky, Tennessee and Georgia, are sometimes cited in support of the right to take property in this manner for mills. But in all these States the mills were made public mills, by being required by law to grind for all in due turn for regulated tolls, and in some of them the mills were made public by more explicit provisions. CARR, J., *Crenshaw v. Slate River Company*, 6 Ran. (Va.) 245; *Burgess v. Clark*, 13 Ired. (N. C.) 109. In Kentucky, when private property was taken for such a mill, the statute required the mill owner to begin to build the mill within one year, and to complete it within three years, and "afterward continue it in good repair for public use;" and, if destroyed, to rebuild and continue it, or the property taken would revert to the former owner and his heirs. Statute Laws of Kentucky, 1834, p. 1215, § 7; *McAfee v. Kennedy*, 1 Litt. 92; *Shackleford v. Coffey*, 4 J. J. Marsh. 40. The statutes of Tennessee provided that every mill which ground for toll should be a public mill; that the miller should grind according to turn for prescribed tolls, and imposed penalties for violation by millers. Upon the question of the power to take private property for such mills, GREEN, J., in *Harding v. Goodlet*, 3 Yerg. 41, said: "The grist-mill is a public mill. The miller is a public servant. He is allowed a compensation for grinding. His duties as a miller are prescribed, and penalties are imposed for a violation of any of these duties," etc. Upon this ground the taking was upheld in that case.

The supreme court of Alabama held, in *Sadler v. Langham*, 34 Ala. 311, that the right of eminent domain might be exercised in behalf of mills that ground grain for toll, and were compellable by law to render impartial service for all, but seems to have been of the opinion that it could not be exercised in favor of mills not so compellable. Judge COOLEY, in the opinion of the court in *The*

People v. Township Board, decided by the supreme court of Michigan, and reported at large in 9 Am. Law Reg. N. S. 487, said that the distinction taken in *Sadler v. Langham* was a very reasonable one.

The petitioner, as has been seen, could not be compelled by law to render any service with his mill for any one but at his own option, consequently, not impartial service for all.

In the course of the same opinion, Judge COOLEY also said that he "did not understand that the right of eminent domain can be exercised on behalf of private parties or corporations, unless the State, in permitting it, reserves to itself a right to supervise and control the use by such regulations as shall insure to the public the benefit promised thereby, and as shall preclude the purpose which the public had in view in authorizing the appropriation being defeated by partiality, or unreasonable selfish action on the part of those who, only on the ground of public convenience and welfare, have been suffered to make the appropriation."

The legislature in these acts did not reserve to itself any control whatever over the use of the property taken, but left it entirely to the control of the taker.

As to railroads, in respect to the public, all persons have the right to ride, and to have property carried on them in the vehicles of the roads, upon payment of a common charge. As to turnpikes, all persons may pass and carry on them in their own vehicles, upon payment of a common toll. All who have occasion may use ways laid out to private dwellings or lands. School-houses are instruments of a system that is maintained for all the people of the State. The public, or some essential part of it, has the right to have, and has to some extent the actual use and enjoyment of all these, and the takers of property for them are, in some sense, agents for the State in taking, and trustees for the public in holding the property taken, although they go into the enterprises in some cases merely for private gain.

In this case, the public would not take through the petitioner, but the petitioner would take for himself, and the petitioner would not hold as a trustee for the public, but only for himself. It is to be considered that this taking would be for the public benefit, for such is the effect of the finding, but the benefit would not arise out of any use the public would acquire by the taking, but of the better

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use the petitioner would make than the petitioners would of the property taken.

Upon this comparison of these acts and proceedings with the provisions of the constitution, it seems to be plain that this taking would not be for public use within the meaning of the constitution. All the judges who could sit at the hearing of this cause have been consulted with upon this question, and concur in this decision of it. (The judge here referred to an unimportant point.)

Judgment reversed and cause remanded.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

BATES, plaintiff, v. FOSTER.

(80 Me. 187.)

Real estate — construction of deed — breach of covenant.

In an action for a breach of covenants in a warranty deed, it appeared that the deeds, after the usual words of conveyance and a description of the premises, contained the words, "and meaning hereby to convey * * * the same premises and title as conveyed to me by D. W., and no more." It appeared, also, that D. W. conveyed to defendant only an equity of redemption from a mortgage which was still outstanding at the date of the deed, and which plaintiff was subsequently obliged to pay. *Held*, that the deed only conveyed an equity of redemption, and that the action could not be maintained.

ACTION for breach of covenants in a deed of warranty brought by Josiah F. Bates against Charles B. Foster. The deed was given by Foster to Bates, and contained the usual words of conveyance, "give, grant, sell and convey," together with a description of the premises. Then followed the clause: "And meaning hereby to convey to the said Bates the same premises and title as conveyed to me by Daniel Witham, and no more." At the date of the conveyance of the premises by Witham to defendant, there was a mortgage on the premises, and Witham had and conveyed only an equity of redemption. This mortgage was still outstanding when defendant conveyed to plaintiff, and plaintiff was subsequently obliged to pay it. On these facts, the case was reported, and if the action could not be maintained, the plaintiff was to be nonsuited.

———, for plaintiff.

A. Abbey, for defendant.

DANFORTH, J. This is an action for a breach of the usual covenants in a deed of warranty. Whether there has been any breach depends upon the construction to be given to the language used in describing the grant and the premises conveyed; for the covenants in a deed are limited in effect by the description of the grant. *Hoxie v. Finney*, 16 Gray, 332, and cases cited; *Freeman v. Foster*, 55 Me. 508; *Coe v. Persons Unknown*, 43 id. 432.

The defendant's deed, after the usual words of conveyance, "give, grant, sell and convey," followed by a description of the premises, has these words: "And meaning hereby to convey to the said Bates the same premises and title as conveyed to me by Daniel Witham, and no more." It appears that Witham conveyed to the defendant only an equity of redemption from a certain mortgage; that the same mortgage was still outstanding at the date of the defendant's deed to the plaintiff, and that the plaintiff was subsequently obliged to pay.

Did, then, the defendant, by his deed, convey to the plaintiff the interest which he received from Witham, and no more, or did he convey the whole title to the land and hereby covenant against the subsisting mortgage?

The defendant, in his deed, says he intended to convey the same he received from Witham, and "no more." But it is said that these words are repugnant to what goes before, and are, therefore, void. Such a construction is not admissible unless they are necessarily so inconsistent that both cannot stand together. Whatever may have formerly been the rules of construction in this respect, "in modern times, they have given way to the more sensible rule, which is, in all cases, to give effect to the intention of the parties if practicable, when no principle of law is thereby violated." *Pike v. Monroe*, 36 Me. 315.

It was certainly competent for the grantor to convey just such an interest in the land as he chose to do; therefore, no principle of law prevents the giving effect to his clearly expressed intention.

Nor is the latter clause in the description necessarily repugnant to or inconsistent with the former. It is undoubtedly true, that what is expressly granted cannot by subsequent clauses be restricted.

But to have this effect, the grant must be express and specific, and not general. *Cutler v. Tufts*, 3 Pick. 272-277; 3 Washb. on Real Prop. (3d ed.) 370.

The words, "give, grant, sell and convey," do not, of themselves, imply a warranty. *Allen v. Sayward*, 5 Me. 230.

Nor do they expressly and specifically convey the whole title, but are rather words of general description, susceptible of explanation or modification by other appropriate language. They are just as applicable to the conveyance of a right of redemption as to the grant of a fee.

If the words, "same title conveyed to me by Daniel Witham," had immediately followed the words, "give, grant," etc., no doubt could then have been raised as to the meaning of the language or the intention of the parties, and the use of the words would have been entirely appropriate. The right of redemption, and that alone, would have been conveyed.

It can make no difference that the qualifying phrase is further on in the sentence. It is still a part of the description of the title conveyed. The latter words explain the former, and are fit and appropriate for that purpose. They do not destroy or take away the meaning and effect of the first, either in relation to the whole grant or any portion of it, but are simply an explanation.

Taking the whole description together, giving each word its proper signification, as modified by its connections, and the meaning is free from ambiguity; but leave out the latter part, and it is quite as clear that we fail in giving effect to the intention of the parties.

Adopting another test, and we are led to the same conclusion. For the words "meaning the same title conveyed to me by Witham," substitute "subject to the mortgage named," the meaning would be unchanged. The title conveyed would be the same as that obtained of Witham. This would bring it directly within the common practice of reservation, and exceptions made in deeds and within the principle settled in numerous cases. *Kinnear v. Lowell*, 34 Me. 299; *Freeman v. Foster*, 55 id. 508; *Higgins v. Wasgatt*, 34 id. 305; *Gale v. Coburn*, 18 Pick. 397; *Chenery v. Stevens*, 97 Mass. 77.

We are, therefore, of the opinion that, both upon principle and authority, the two clauses in the deed are not repugnant, but may stand together, and the former, as explained by the latter, must be considered as the true meaning of the deed.

Plaintiff nonsuit.

Sturdivant v. Hull.

STURDIVANT *et al.*, plaintiff, v. HULL.

(80 Me. 172.)

Promissory note—agent as maker. Parol evidence.

A promissory note in the form: "I promise to pay to the order of S. & Co." etc., and signed "John T. Hull, Treas. St. Paul's Parish," is the note of Hull, and parol evidence is inadmissible to show that it was the understanding of the parties when the note was given that it was the note of the parish and not of Hull. (*See note, p. 415.*)

ACTION on a promissory note. The opinion states the case.

T. T. Snow, for plaintiffs.

A. A. Strout, for defendants.

BARROWS, J. Assumpsit by the payee against the maker of a promissory note of the following tenor:

"\$225.00.

PORTLAND, Dec. 20, 1869.

C. S. L. R.
Stamp.
25 cents.

Four months after date, I promise to pay to the order of Sturdivant & Co., two hundred and twenty-five dollars. Payable at either bank in Portland, with interest. Value received. JOHN T. HULL, *Treas. St. Paul's Parish.*"

The signature to the note was not denied, but the defendant offered to prove, and if evidence *dehors* the note is admissible for that purpose, we must consider it as proved that, at the time the note was made, defendant was treasurer of St. Paul's parish, and made the note in suit, in behalf of said parish and for their sole benefit, in renewal of a former note given by his predecessor, Moody, for lumber used in building their parish church, and that defendant never received any personal consideration or any consideration for the note other than the foregoing. And that these facts were known to the plaintiffs when the note was given, and that the understanding and intention of both parties then was, that it was the note of the parish and not of the defendant.

As the suit is between the original parties to the note, it follows

that, if the proffered evidence showed that there was no valid consideration for the defendant's promise, it should have been admitted. But such is not the case. It is not necessary that the consideration should have inured to the personal benefit of the promisor, and the surrender of the previous note, or the extension of the term of credit originally given to the parish for the lumber, would either of them be a sufficient consideration for the defendant's note.

The case presents but two questions:

1. Whether the defendant's liability must be determined solely by the written instrument which he has subscribed, excluding the evidence above offered to control its construction?

2. If so, does the true construction of it make it his note, or that of the parish?

I. Now when parties are competent witnesses, and stand ready to testify (if allowed) not only to their own intentions, but to those of the other party to the contract, the wisdom of the long-established rule, which requires all parties to written contracts, at their peril, to state what they mean to abide by in the writing itself, and prohibits them from resorting to oral testimony to contradict or vary its terms, grows more apparent every day.

One of the illustrations of this rule, given by Mr. Greenleaf in his *Treatise on Evidence*, volume 1, page 320, edition of 1842 (citing *Stackpole v. Arnold*, 11 Mass. 27), runs thus: "Where one signed a promissory note in his own name, parol evidence was held inadmissible to show that he signed it as the agent of another, on whose property he had caused insurance to be effected by the plaintiff, at the owner's request."

When a man has deliberately said, in writing, "I promise to pay," and a valid consideration for the promise is shown, right and justice are not very likely to be the gainers by allowing him to retract and undertake to prove that he did not actually mean "I promise," but that he meant, and the other party understood that he meant, that some third party, whose promise the writing does not purport to be, undertook the payment.

It is better that a careless or ignorant agent should sometimes pay for his principal, than to subject the construction of valid written contracts to the manifold perversions, misapprehensions and uncertainties of oral testimony.

And upon this point the decisions (although, in cases of like type with this, they are somewhat conflicting, or, at least, distinguished

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with scarcely a shade of difference, upon the question of the construction of the instrument itself), will be found concurring. *Andrews v. Estes*, 11 Me. 270; *Hancock v. Fairfield*, 30 id. 298; *Slawson v. Loring*, 5 Allen, 342; *Draper v. Mass. Steam Heating Co.*, id. 338; *Barlow v. Cong. Soc. in Lee*, 8 id. 460; *Tucker Manuf. Co. v. Fairbanks*, 98 Mass. 104, and cases there cited.

Nor is this wholesome rule abrogated by any of our statute provisions touching the responsibility of principals upon contracts made and executed by their authorized agents. R. S. of 1857, ch. 73, § 15; id., ch. 1, § 4, clause XXI. Even if those provisions should be held to apply to any contracts not purporting on their face to be made by the agent for or in behalf of the principal (a question which need not now be discussed or decided), it is one thing to extend a liability to a real party in interest, and afford a remedy against him, and quite a different thing to discharge the liability expressly assumed and incurred by him who has made himself a party to the written contract. This, it is safe to say, is a result the legislature did not intend, or they would not have left a matter of such importance to be inferred merely, but would have expressed it in unmistakable terms.

We are satisfied that these provisions are not to be considered as applying to negotiable paper in such a way as to make parol evidence of the understanding and intention of the parties admissible to relieve an agent who has, on the face of the paper, expressly assumed the liability himself.

The provisions are found among those designed to regulate conveyances, by deed and contracts, respecting real estate, and those relative to the construction of statutes. The statute of 1823, chapter 220, from which Revised Statutes, chapter 73, section 15, was derived, is expressly limited to "deeds, bonds, contracts and agreements purporting to be made and executed by any agent, attorney or committee for and in behalf of any other person or corporations," and "provided it appear by said deed, bond, contract or agreement to have been the intention of the parties to bind the principal or constituent." Clause 21, of section 4, chapter 1, Revised Statutes of 1857, is simply one of "the rules to be observed in the construction of statutes," and originally ran thus: "When a statute requires an act to be done which may, by law, be done as well by an agent as by the principal, such requisition shall be con-

strued to include all such acts when done by an authorized agent." R. S. of 1841, ch. 1, § 3, clause xx.

We do not think that the true intent, meaning and application of these provisions, as originally enacted, have been changed in the subsequent revision of 1857 and 1871. Obviously they are not designed to change the established law with regard to negotiable paper. So far as those contracts are concerned, there are special reasons for adhering strictly to the old rule first adverted to. They are well assigned in *Williams v. Robbins*, 16 Gray, 77, and *Barlow v. Cong. Soc. in Lee, ubi supra*.

The defendant's liability must be ascertained by an examination of the note itself.

II. As has already been suggested, the cases involving the construction of similar instruments are more difficult to reconcile than those in which the point just disposed of has been considered. Apparently slight changes in the phraseology have affected the construction adopted by different courts, and by the same court in different cases. There is a necessity for a careful examination and comparison of the numerous decisions. This we have endeavored to make, and the result is, we are satisfied that the weight of reason and authority demonstrates that this is the personal contract of the defendant and not that of the parish of which he was treasurer.

There are no appropriate words in it to show that it was the contract of the parish, or that it was made by the defendant in its behalf. He does not say that he promises as treasurer, or use any language significative of an intention to bind his successors in office as in *Barlow v. Cong. Soc. in Lee*; in which case *Mann v. Chandler*, a *per curiam* opinion reported in 9 Mass. 335, is disavowed as an authority, and it is said that "all the decisions of this court upon unsealed instruments, since the case of *Mann v. Chandler*, have required something more than a mere description of the general relation between the agent and the principal, in order to make them the contracts of the latter." *Vide*, 8 Allen, 461, 462, 463.

In *Haverhill M. F. Ins. Co. v. Newhall*, 1 Allen, 130, upon a note signed "Cheever Newhall, president of the Dorchester Avenue Railroad Company," though it was agreed that the defendant, at the time of signing the note, was the president of said company; that it was given in consideration of a policy of insurance issued by the plaintiffs to that company, upon property owned by them, and that the defendant was duly authorized by the company to obtain the

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insurance and sign the note, it was held that the form of the note only was to be looked at upon the question of charging the defendant; that he had fixed a personal liability upon himself by the use of the words, "I promise to pay," and that this liability was not affected by the descriptive addition of his signature.

In *Fiske v. Eldridge*, 12 Gray, 474, the note was signed "John S. Eldridge, Trustee of Sullivan Railroad," and the defendant was held personally liable, though he proved that he was trustee of the railroad company, and as such had entire charge of its property and business, and gave the note in suit to take up a promissory note of the corporation, and delivered with it bonds of the corporation, as collateral security for its payment.

The defendant's counsel relies upon certain *dicta* intimating that the case of *Mann v. Chandler* may be sustained, because the defendant there, as here, was treasurer of the corporation, and that the signature of that officer may be thought, of itself, to import a promise of the party whose treasurer he is.

But we should be unwilling to say that the treasurer of a religious corporation has any authority, by virtue of his office, to bind such corporation by the issue of negotiable promissory notes, or that the official signature of such treasurer could be considered as indicating the assertion of such authority, any more than the signature of a person describing himself as president or trustee of a business corporation asserts the requisite authority on the part of such president or trustee.

In *Mann v. Chandler*, relied on by the defendant, the special authority conferred by the directors upon the treasurer to give the note in suit was shown, and in the more recent cases above cited, from 12 Gray and 1 Allen, such authority was either admitted or proved without objection. But the tendency of the later decisions manifestly is, to hold the man who says "I promise to pay" (without stating in the writing itself that he promises for or in behalf of any other party), responsible personally. Why should it not be so? That is the plain and direct import of the language he uses. "I" is not the language of a corporation or association. It is that of an individual signer. If a signer appends to his signature a description of himself as agent, president, trustee or treasurer of a corporation, it may import a declaration on his part that, having funds of such corporation in his possession, he is willing to be responsible, and accordingly makes himself responsible for a debt of theirs.

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And this *descriptio personæ* may aid him in the keeping and adjustment of his accounts with his different principals.

But without some words in the contract importing that he promises for or in behalf of his principal, he cannot avoid the personal liability he has thus assumed.

In *Seaver v. Coburn*, 10 Cush. 324, the contract signed by defendant as "Treasurer of the Eagle Lodge," etc., was held binding upon him personally. And the distinction which the defendant seeks to set up between treasurers and other officers and agents of corporations was ignored.

The fact that it has been suggested as a possible ground upon which the case of *Mann v. Chandler* (so often doubted and so recently denied to be an authority in the court which pronounced it) might be sustained, can hardly be expected to avail the defendant here.

This subject has been elaborately discussed in *Tucker Manuf. Co. v. Fairbanks*, 98 Mass. 101, and in *Barlow v. Cong. Soc. in Lee*, 8 Allen, 460, and what we have already said may seem superfluous.

It is a satisfaction, however, to know that the view of the law which we take comports well with justice also. In the agreed statement of facts which the parties have appended to the case, it appears that, in May, 1870, the parish mortgaged their church edifice and other property to Henry A. Neely, and the defendant, and other members of the parish associated with them, to secure them for liabilities assumed by them for the parish, and that in the following month, before the commencement of this suit, the equity of redemption from this mortgage was sold on execution against the parish, and purchased in by the mortgagees, so that the appropriation of the materials furnished by the plaintiffs for the building of the church, without compensation, would seem to be a sort of pious fraud, which we should be slow to sanction so long as a legal reason for avoiding it could be found.

In the agreed statement it further appears that there never was any vote of the parish authorizing defendant, as treasurer or otherwise, to sign any negotiable or other paper for the parish, but that, at a meeting of the parish, in September, 1869, on defendant's motion, it was voted that the parish assume the payment of all liabilities thus contracted by said Neely, the defendant and others, by thus signing or indorsing any notes for the parish, and that they would "save

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and hold harmless, from any loss or injury, all persons whatsoever, who may have or shall hereafter assume or become responsible for the payment of any debts of the parish." And on the 12th day of May, 1870, they voted to assume the payment of all notes signed by defendant as treasurer. This tardy assumption might not have availed the plaintiffs in a suit against the parish on this note; for it seems to have been held that, when one signs as agent in such a case, his authority at the time must be shown, and that subsequent ratification will not make it good as the act of the principal. *Taber v. Cannon*, 8 Metc. 461; *Rossiter v. Rossiter*, 8 Wend. 499.

But the defendant, who is mortgagee of all the church property, and co-owner of the equity of redemption, fortified by such a vote may haply find means to make it available for his protection.

Exceptions overruled. Judgment for plaintiffs.

NOTE.—See *Carpenter v. Farnsworth*, ante, p. 383, and note. See, also, *Morris v. Farnes*, ante, p. 45. — RMR.

TOBIN, plaintiff, v. PORTLAND, SACO AND PORTLAND R. R. Co.

(30 Me. 123.)

Railroad — Liability for defects in platform.

A railroad company negligently left their depot platform in a defective condition. A hackman, while carrying a passenger to the depot for transportation, stepped, without fault, into a cavity in the platform, and was injured. *Held*, that the company was liable, and the liability was the same, notwithstanding the platform was within the limits of the highway. (See note, p. 417.)

ACTION in the case for damages occasioned to plaintiff, a hackman, in consequence of stepping, without fault, into a cavity in the defendant's depot platform. The plaintiff, at the time of the injury, was carrying a passenger to defendant's depot for transportation. The platform was erected and maintained by defendants wholly within the limits of the highway. At the trial, the judge charged that the defendants were responsible to persons induced to pass over the platform on business necessarily and immediately connected with their depot, for the exercise of ordinary care and prudence in

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the repair of the platform, and for any damages solely, directly and evidently incurred by any defect growing out of the want of such care, the person injured being duly careful at the time. The verdict was for plaintiff. Defendants alleged exceptions.

Bradbury & Bradbury, for plaintiff.

N. Webb, for defendants.

APPLETON, C. J. The plaintiff, a hackman, carrying passengers to the defendant's depot, was injured in stepping from his carriage into a cavity in the platform built and occupied by them. The jury have found that the plaintiff was without fault, and that the injury he sustained was occasioned solely by the neglect and want of ordinary care of the defendants in having their platform in an unsafe and dangerous condition.

The defendant corporation is bound to make the approaches over their own premises to their depot safe and convenient for passengers. They are bound to keep their platforms and landing-places safe and convenient for all who make use of their cars as a means of conveyance. *Knight v. P. S. & P. R. R. Co.*, 56 Me. 505. They would be liable in damages for any injury occasioned by their neglect to any person who, on his part, was without fault. This is conceded by the able counsel for the defendants.

But the railroad corporation is bound, not merely to keep these platforms safe for their passengers, but for all who have rightful occasion to use them. This obligation, arising from their public character and the duties resulting from their acceptance of a charter from the State, exists as to all rightfully upon their premises.

The hackman, conveying passengers to a railroad depot for transportation, and aiding them to alight upon the platform of the corporation, is as rightfully upon the same as the passengers alighting. It would be absurd to protect the one from the consequences of corporate negligence and not the other. The hackman is there in the course of his business; but it is a business important to and for the convenience and profit of the defendants. The general principle is well settled, that a person injured, without neglect on his part, by a defect or obstruction in a way or passage over which he has been induced to pass, for a lawful purpose, by an invitation express or implied, can recover damages for the injury sustained against the individual so inviting and being in fault for the defect. *Barrett v.*

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Black, 56 Me. 498; *Carleton v. Franconia Iron and Steel Company*, 99 Mass. 216.

It is objected that the defendant built the platform within the limits of the public highway. But it is no answer to the plaintiff, when seeking compensation for the consequences of their neglect, that they have trespassed upon the rights of the public. They have built the platform and used it. Their passengers and those having rightful occasion to be upon it are there by their invitation, and they are responsible for its condition.

It may be that the city of Portland might be liable for a nuisance within the limits of their public highways, erected and maintained by the defendant corporation. But, if so, the city would have the right of reclamation against those creating the nuisance. *Portland v. Richardson*, 54 Me. 46. Much more, then, could the party injured maintain his action directly against the corporation causing the injury.

Exceptions overruled.

NOTE. — See note to *Weisenberg v. City of Appleton*, 7 Am. R. 48.

In *McDonald v. Chicago & N. W. Ry. Co.*, 28 Iowa, DILLON, C. J., laid down the following rule as applicable to all cases of injury about stations: "Railway companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platforms, where passengers, or those who have purchased tickets, with a view to take passage on their cars, would naturally or ordinarily be likely to go." See *Bargess v. R. R. Co.*, 96 Eng. Com. L. 228; *Martin v. R. R. Co.*, 81 Id. 179.

In *Shepherd v. The Midland Railway*, 20 W. R. 705, the plaintiff, while waiting for the train, it being cold, walked back and forward on the platform in front of the station, and slipping on a strip of ice fell, dislocating his shoulder. *Held*, that he could recover.

In *Caswell v. Boston & Worcester R. R. Co.*, 26 Mass., it was held that where a passenger had stepped upon the platform in front of the station to wait for a train, and, by the negligent misplacement of a switch, an engine appeared to be approaching directly toward the platform, and the passenger had cause to apprehend danger, and, while running to avoid it, was injured, the company was liable. In *Longmore v. Great Western Railway Co.*, 115 Eng. Com. L. 183, it appeared that a railway company, for the more convenient access for passengers between two platforms of a station, erected across the line a wooden bridge which the jury found to be dangerous. *Held*, that the company were liable for the death of a passenger through the faulty construction of the bridge, although there was a safe one about one hundred yards further around which the deceased might have used.

See, however, *Garrison v. Mayor*, 5 Bosw. 497, where the plaintiff sustained injuries through the breaking of a decayed pier owned by the corporation. The court held that express notice of the defect must be proved or that it was obvious without particular examination — RMR.

SYMONDS, plaintiff, v. BARNES.

(56 Me. 121.)

Bankruptcy—omission of creditor's claim from schedule of debts.

The omission of a petitioner in bankruptcy, under the act of 1867, to include a creditor's claim in his sworn schedule of debts, or to see that the creditor has notice of the proceedings, must be shown to be willful and fraudulent in order to avoid the discharge.

ACTION in a promissory note dated April 21, 1853, given by defendant to plaintiff. Defendant pleaded a discharge in bankruptcy under the act of 1867. Plaintiff replied that his claim was omitted from the schedule of debts sworn to by defendant; and that he had no notice of the proceedings in bankruptcy, and that he never proved his claim. To the reply there was a demurrer and joinder. The demurrer was sustained; whereupon plaintiff alleged exceptions.

Symonds & Libby, for plaintiff.

J. D. & F. Fessenden, for defendant.

APPLETON, C. J. By the bankrupt act of 1841 the discharge of a bankrupt might be impeached for fraud in any court in which it was pleaded in bar to a pending suit.

By the bankrupt act of 1867, section 34, it is enacted, "that a discharge duly granted under this act shall release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy," unless his creditors should "see fit to contest the validity of said discharge on the ground that it was fraudulently obtained." This must be done in the court in which it was granted within two years, for some of the fraudulent acts of omission or commission particularly set forth in section 29. Such was the construction given by this court to the act, in *Corey v. Ripley*, 57 Me. 69, and upon examining the debates, when the bill was under discussion, it will be seen that the effect there given to the discharge, unless set aside and annulled by the federal court granting it, was in strict conformity with the intention of congress.

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The defendant pleads a discharge. It is in due form of law. "An order of discharge will be sufficient evidence of bankruptcy and of the validity of the proceedings thereon." Robson's Law of Bankruptcy, 458. The order proves itself. 1 Deacon on Bankruptcy, 800.

The plaintiff replies that his claim was omitted in the schedule of debts sworn to by the defendant. If the bankrupt "has willfully sworn falsely in his affidavit annexed to his * * * schedule or inventory," the court granting the discharge may, upon proceedings duly had before it, "set aside and annul the same."

But the plea contains no allegation of fraudulent conduct or willful false swearing. The court granting the discharge would not be authorized by the act "to set aside or annul the same." Much less would any other court.

Under the act of 1841, it was held that a plaintiff could not avoid a discharge of his bankrupt debtor by merely showing that the defendant, in his petition in bankruptcy, omitted to insert the plaintiff's name, etc., to the sworn list of creditors, and that by reason of such omission the plaintiff had no notice of the proceedings in bankruptcy, and could neither prove his claims against the defendant nor oppose his discharge. To avoid the discharge, by reason of such omission, it must be shown to be willful and fraudulent. *Burnside v. Brigham*, 8 Metc. 75; *Mitchell v. Singletary*, 19 Ohio, 219.

The accidental omission of a creditor's name in the schedule of indebtedness is not made a ground for annulling and setting aside a discharge. The omission, to have that effect, must be fraudulent. The affidavit annexed to the schedule must be willfully false. Indeed, the act assumes that the schedule of debts may not be complete, for, by section 11, the marshal is directed to serve "written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor."

Exceptions overruled.

CARTER, plaintiff, v. ALLEN.

(55 Me. 294.)

Tax-collector — Liability of.

A tax-collector, whose statutory duty was, after selling a distress, to deduct the tax and expense of sale, and restore the balance to the former owner, applied a portion of the proceeds in payment of a tax already paid, and of illegal charges, before returning the balance. *Held*, an abuse of authority which rendered him a trespasser *ab initio*.

ACTION of trespass by Asa Carter against George W. Allen, sheriff of Surry. Defendant was collector for 1865, 1866 and 1867, and seized a colt of plaintiff for non-payment of taxes for these years. The distress was regularly sold, but it was contended in this action that defendant did not comply with Revised Statutes, chapter 6, section 105, in properly "restoring the balance to the former owner, with a written account of the sale and charges." The account was furnished and the surplus, according to the account, was tendered to plaintiff, but it appeared that the account was inaccurate, and contained the tax of 1866, which had already been paid by sale of real estate, and certain charges which were illegal. The case was reported; and, if the action could be sustained, the plaintiff's damages were to be assessed by the court at *nisi prius*.

A. Wiswell, for plaintiff.

E. Hale and L. A. Emery, for defendant.

WALTON, J. It was held in the celebrated case of *The Six Carpenters*, 8 Coke, 146, and in a large number of cases since, that if a man abuses an authority given him by the law, he becomes a trespasser *ab initio*.

The rule is founded in public policy. It was observed that persons clothed with official power were exceedingly apt to become careless and oppressive in the use of it. To counteract this tendency they are required to act at their peril. If they do not exceed their authority, nor in any way abuse it, the law protects them; if they do, then their protection is gone. Security against official

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carelessness and oppression is the reason of the rule; and this protection being as necessary now as at any former time, there ought to be no relaxation of the rule.

Assuming that in this case the defendant, as collector of taxes, had a right to seize and sell the plaintiff's property to pay the taxes that were then due and unpaid, it was clearly his duty, after deducting the tax and expense of sale, to restore the balance to the plaintiff. R. S., ch. 6, § 105. This he did not do. On the contrary, he applied a portion of the money to pay a tax that had already been paid, and another portion of it to pay charges which he had no right to make. This is admitted. We cannot doubt that such a misappropriation of the proceeds of the sale was, in contemplation of law, such an abuse of his authority as made him a trespasser *ab initio*.

The statute above cited provides that the officer, after deducting the tax and expense of sale, shall restore the balance to the former owner, with a written account of the sale and charges. It was held in *Blanchard v. Dow*, 32 Me. 557, that a failure to deliver the written account made the collector a trespasser *ab initio*. Can a failure to deliver the balance of the money actually due have a less effect? The statute, in the same sentence, requires both the money and the account to be delivered. If a failure to deliver the one makes the officer a trespasser *ab initio*, how can a failure to deliver the other have a less effect? Is not the money quite as important to the former owner as the written account; and if a failure to deliver the latter makes the officer a trespasser *ab initio*, *a fortiori*, will not a neglect to deliver the former have the same effect? We cannot doubt that it will.

Defendant to be defaulted.

Damages to be assessed by the court at nisi prius.

STATE, plaintiff, v. CLEAVES.

(89 Me. 208.)

*Husband and wife — liability of wife for acts committed in husband's presence —
Criminal law — effect of defendant not testifying.*

On an indictment against a wife for being a common seller of intoxicating liquors, the judge charged the jury "that the fact that defendant did not go upon the stand to testify was a proper matter to be taken into consideration in determining the question of her guilt or innocence." The judge was requested to charge the jury "that if any of the sales were made by the wife in the presence of her husband, she would be presumed to act under the coercion, compulsion or direction of her husband, and would not be liable for such sales." The request was refused. *Held*, that the charge and the refusal to charge were correct.

The presumption of law, that the wife committed an offense by the coercion of the husband, when he was present, is very slight, and may be rebutted by slight circumstances; and, while the first portion of the request was legally correct, the conclusion contained in the last clause, that she "would not be liable for such sales," is incorrect.

INDICTMENT against a married woman for being a common seller of intoxicating liquors. It appeared that, at some of the sales, the husband of defendant was present. The judge charged the jury "that the fact that the defendant did not go upon the stand to testify, was a proper matter to be taken into consideration by them in determining the question of her guilt or innocence." The judge was requested to charge the jury "that, if any of the sales were made by the wife in the presence of her husband, she would be presumed to act under the coercion, compulsion or direction of her husband, and would not be liable for such sales." This was refused. The jury returned a verdict of guilty. Defendant alleged exceptions.

T. B. Reed, attorney-general, for State.

H. L. Whitcomb, for defendant.

APPLETON, C. J. The defendant, a married woman, was indicted for being a common seller of intoxicating liquors.

The presiding justice instructed the jury "that the fact that the

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defendant did not go upon the stand to testify was a proper matter to be taken into consideration by them in determining the question of her guilt or innocence." To this instruction exceptions were seasonably taken.

The statute authorizing the defendant in criminal proceedings, at his own request, to testify, was passed for the benefit of the innocent and for the protection of innocence.

The defendant, in criminal cases, is either innocent or guilty. If innocent, he has every inducement to state the facts, which would exonerate him. The truth would be his protection. There can be no reason why he should withhold it, and every reason for its utterance.

Being guilty, if a witness, a statement of the truth would lead to his conviction, and justice would ensue. Being guilty, and denying his guilt as a witness, an additional crime would be committed, and the peril of a conviction for a new offense incurred.

But the defendant, having the opportunity to contradict or explain the inculpatory facts proved against him, may decline to avail himself of the opportunity thus afforded him by the law. His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the case. The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused? All the analogies of the law are in favor of their regarding this as an evidentiary fact. All the acts of a party accused, whatever explains or throws light upon those acts, all the acts of others, relative to the crime charged, that come to his knowledge and which may influence him; his loves and his hates, his promises, his threats, the truth of his discourses, the falsehood of his apologies, pretenses and explanations; his looks, his speech, his silence when called upon to speak; every thing which tends to establish the connection between the accused and the crime with which he is charged; every circumstance preceding, accompanying or following may become articles of circumstantial evidence of no slight importance. "A statement is made either to a man or within his hearing, that he was concerned in the commission of a given crime, to which he returns no reply; the natural inference is, that the imputation is well founded or he would have repelled it; silence is tantamount to confession." Best on Presumptions, § 241. Extrajudicial non-responson, when a charge is made, is always regarded as an article

of circumstantial evidence, the probative effect of which may be weakened by various infirmative considerations, which it is not now necessary to discuss, but which are to be considered and weighed by the jury.

When the prisoner is on trial, and the evidence offered by the government tends to establish his guilt, and he declines to contradict or explain the inculpatory facts which have been proved against him, is not that a fact ominous of criminality? Is his silence of any the less probative force, when thus in court called upon to contradict or explain, by the pressure of criminative acts, fully proved, than his extrajudicial silence when a charge is made to him or in his presence? The silence of the accused — the omission to explain or contradict, when the evidence tends to establish guilt is a fact — the probative effect of which may vary according to the varying conditions of the different trials in which it may occur, which the jury must perceive, and which perceiving they can no more disregard than one can the light of the sun, when shining with full blaze on the open eye.

It has been urged that this view of law places the prisoner in an embarrassed condition. Not so. The embarrassment of the prisoner, if embarrassed, is the result of his own previous misconduct, not of the law. If innocent, he will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of contradiction or explanation, it is his fault; if, by his own misconduct or crime, he has placed himself in such a situation that he prefers any inferences which may be drawn from his refusal to testify, to those which must be drawn from his testimony if truly delivered.

The instruction given was correct, and in entire accordance with the conclusions to which, after mature deliberation, we have arrived. *State v. Bartlett*, 55 Me. 200; *State v. Lawrence*, 57 id. 575.

It appeared that at some of the sales the husband of the defendant was present when the liquor was called for by the purchaser and delivered by the defendant.

The presiding judge was requested to instruct the jury "that if any of the sales were made by the wife in the presence of her husband, she would be presumed to act under the coercion, compulsion or direction of her husband, and would not be liable for such sales." This instruction he declined to give.

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It is a general rule of the common law, that if a married woman commit an offense in the presence of her husband (with certain exceptions, of which the unlawful sale of intoxicating liquors is not one), his coercion will be presumed, and, unless rebutted, the wife will be entitled to an acquittal. Such is the law of England, and such has always been regarded the law in this country. *Commonwealth v. Neal*, 10 Mass. 152. A married woman cannot be punished for a sale of intoxicating liquors, either as principal or as agent of her husband, if he is near enough for her to be under his influence and control, even if he is not in the same room with her. *Commonwealth v. Burk*, 11 Gray, 437. "The law," observes THOMAS, J., "regards her as not in the exercise of her own discretion and will, and, therefore, as incapable of committing an offense." In *Commonwealth v. Egan*, 103 Mass. 71, the complaint was for an assault. MORTON, J., in delivering the opinion, says: "The assault of which the defendant was convicted was committed in the immediate presence of her husband, and the presumption of law is that she acted under his coercion." *Commonwealth v. Gann*, 97 Mass. 547.

When the wife sells intoxicating liquors in the absence of her husband, she may be indicted as a common seller. *Commonwealth v. Murphy*, 2 Gray, 510. When the wife offends alone, she is responsible for her offense equally as if sole. *State v. Nelson*, 29 Me. 329.

But the presumption of law, that the wife committed an offense by the coercion of the husband when he was present, is very slight, and may be rebutted by very slight circumstances. The presumption is in no respect conclusive. While, therefore, the first portion of the request was legally correct, the conclusion contained in the last clause, that she "would not be liable for such sales," is incorrect. She might be liable, notwithstanding the presence of her husband, for the attendant circumstances might entirely negative influence or coercion on his part. The request did not recognize the distinction between a *prima facie* presumption which might be, and a conclusive presumption which could not be contradicted, but was so framed as to give to the former the force and effect of a presumption of law, to which it was in no respect entitled. *Marshall v. Oakes*, 51 Me. 308.

Now, when a request is made, it must, in its totality, be sound law, else it is properly withheld. It is for the party making a request to see to its correctness at his peril. It is for the court to take care

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that the instructions given are in accordance with the law. It is no part of its duty to eliminate the errors in an instruction which they are requested to give — to select a portion and to refuse the residue of the request.

Exceptions overruled.

LAMB, plaintiff, v. DANFORTH.

(50 Me. 222.)

Tenants in common — breach of covenant. Easements.

Tenants in common have several freeholds, and are not obliged to join in an action against their grantor for a breach of the covenants of warranty in his deed.

Defendant conveyed to plaintiff, by deed of warranty, premises, a portion of which he had previously conveyed and given possession of to another. The premises were subject also to certain easements, such as a right of way, and the right to maintain a dam. *Held*, that the covenant of seisin, so far as it related to the portion previously conveyed, was broken at the date of the deed, and that the existence of the outstanding easements was a breach of the covenants of warranty.

ACTION for breach of covenant brought by Nathan Lamb against Waldo Danforth. The deed for breach of the covenants, in which the action is brought, was given by defendant to plaintiff and John Lamb, dated December 12, 1865, and purported to convey, with covenants of warranty, the estate described therein. It appeared that a portion of the premises so conveyed had been conveyed October 11, 1849, by Stephen Danforth, Jr., father of defendant (from whom defendant derived title), to one Dow and others. The deed to Dow also contained various grants of easements of the premises, such as a right of way to a stream on which the premises bordered, the right to maintain a dam, to use the shores, etc. Dow, or those claiming under him, were in possession of the portion of the premises conveyed to him when this action was brought. The case was reported; and, if maintainable, the action was to stand for trial.

Sewall & Blanchard, for plaintiff.

J. H. Hilliard, for defendant.

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APPLETON, C. J. On the 12th December, 1865, the defendant, by his deed of warranty, conveyed to the plaintiff and one John Lamb certain real estate in Argyle. To a portion of the premises the grantor had neither title nor possession. The premises conveyed were subject to certain easements, such as a right of way, the right to maintain a dam, to use the shores, etc.

The deed to the plaintiff and John Lamb was to them as tenants in common. But tenants in common have several freeholds, and are not obliged to join in an action against their grantor for a breach of the covenants of warranty in his deed. *Swett v. Patrick*, 11 Me. 179; *Hammond on Parties*, 29; R. S., ch. 104, § 9.

A public road is an easement the existence of which, over a lot of land conveyed by deed, with covenants of warranty, is a breach of those covenants. *Haynes v. Young*, 36 Me. 557. So is a private right of way. *Harlow v. Thomas*, 15 Pick. 66. In *Giles v. Dugro*, 1 Duer, 334, the defendant assigned a lease, covenanting therein that it was free and clear of all former grants, bargains and incumbrances whatsoever. A prior grant of a privilege of the use of a wall on the premises, as a party-wall, was held a breach of the covenant. The former grant created a paramount right to the extent of the interest granted. So here, as to the easements previously granted by deed upon the plaintiff's land.

The plaintiff is in possession of the land over which easements had been previously granted. The exercise of those rights by a stranger having a paramount title is a disturbance, or interruption of the plaintiff's quiet enjoyment of the premises conveyed. *Sprague v. Baker*, 17 Mass. 586. The defendant conveyed to the plaintiff a tract of land having a spring thereon with covenants of seizin and warranty. Prior to this he had conveyed to another the right to the water of the spring and of drawing it away by an aqueduct to his premises. It was held that here was a breach of the covenant of warranty. *Clark v. Conros*, 38 Vt. 469. So in this case, the outstanding easements prevent the plaintiff having a clear title to the land deeded. The covenant of seizin, so far as relates to the land previously conveyed to Wm. H. Dow, was likewise broken at the date of the deed.

There is a breach of the covenants of the defendant's deed, and by the agreement of the parties the case is to stand for trial.

Vigoreaux v. Lime Rock Insurance Co.

VIGOREAUX, plaintiff, v. LIME ROCK INSURANCE CO.

(59 Me. 487.)

Marine insurance — time policy.

In an action on a policy of marine insurance on a vessel, effected April 9, 1866, "for one year from March 14, 1866, at noon," it appeared that the agent of the company, for receiving and forwarding applications in his letter of April 9, stated that the vessel "was at Gibraltar" March 14. *Held*, that the statement of her whereabouts was immaterial.

Under a time policy of marine insurance, it is immaterial where the vessel may be at the inception or termination of the risk.

ACTION on a policy of marine insurance upon a vessel, effected April 9, 1866, "for one year, from March 14, 1866, at noon." The vessel was injured March 15-19, 1866. The opinion states the case.

Tallman & Larrabee, for plaintiff.

A. P. Gould, for defendants.

APPLETON, C. J. On 10th April, 1866, the defendants insured the plaintiff, and whom it might concern, "lost or not lost, twenty-two hundred dollars on the ship Thomas Lord for one year from March 14, 1866, at noon." Shortly after March 14th, the vessel was damaged and an injury sustained, for which the defendants are responsible, if the policy attached. The policy is what is termed a "time policy," and in such case it is immaterial where the vessel may be at the inception or termination of the risk. It is not pretended that there was any fraudulent conduct on the part of the plaintiff.

The insurance was effected through the procurement of Edwin Reed, who was an agent of the defendants, receiving applications for insurance, and forwarding the same to them, for which service he was allowed a commission. In his letter to them of April 9, 1866, requesting an insurance "for a year from March 14, 1866, noon," he writes, "she was at Gibraltar on that date."

The defense is that this statement was a material representation, and not being strictly accurate, the policy never attached.

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But the representation cannot be regarded as material. That the defendants did not so regard it is evidenced by the fact that no mention is made of it in the policy. In *Manly v. United M. & F. Ins. Co.*, 9 Mass. 85, the policy was "for one year, commencing the risk at Barbadoes, on 7th December, 1810, at 12 o'clock at noon of said day." In fact, the vessel had left Barbadoes the preceding day. The objection was taken that the policy never attached, but the court held otherwise. "When the insurance," observes SEWALL, J., "is for a term of time, the *termini* of the risk are the day and hour when the insurance commences and when it terminates, which last may be expressed by the term of its continuance; and to state the place where the risk shall be understood to have been commenced, or where the vessel shall be when it terminates, is unusual, and considering the uncertainty incident to the subject, would be inconvenient and render the existence of the contract uncertain, if the parties were thereby authorized to insist upon an exact coincidence of time and place." In *Martin v. The Fishing Insurance Co.*, 20 Pick. 389, a vessel was insured "at and from Calais, Maine, on the 16th day of July, at noon, to and from all ports and places to which she may proceed in the coasting business for six months." It was held, that the policy attached, though there was no evidence that the vessel was prosecuting her voyage from Calais, on the day named, neither party knowing where the vessel was then, and it being their intention to insure on time, without regard to where the vessel might then be. Much more in the case at bar should the policy be deemed to attach, as there is no reference whatever to place, but the risk commences and terminates at definite periods of time.

But if the law were otherwise, it is difficult to perceive what grounds of complaint the defendants can have. It does not appear that the plaintiff made any statements to the broker as to the locality of the vessel, or authorized him to make any to the defendants, or that he knew any thing as to where the vessel was on the 14th March. Reed was a part-owner of the *Thomas Lord*, and made the statement on his own account from aught that appears. It is not pretended that his conduct was in the slightest degree dishonest. He was the agent of the defendants in procuring the insurance, and if, without authority from the plaintiff, he made a representation which was not strictly true, the plaintiff, who neither directed nor desired it, should not suffer therefor.

But it is not that there was any misrepresentation. It is conceded

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that the vessel, at the time from which the policy begins, was in the Bay of Gibraltar, and within the general anchoring ground. Indeed, the plaintiff's witnesses testify that it is considered rather an open bay than a proper harbor.

The plaintiff is entitled to recover. The damages have been agreed upon at \$512.45. From this sum is to be deducted the premium note of \$232 and interest, and a default is to be entered for the balance with interest from the date of the writ.

EATON et al., plaintiffs, v. EUROPEAN & NORTHERN RAILWAY CO.

(50 Me. 380.)

*Railroad company — injuries to adjoining property in constructing road.
Respondent superior.*

A railroad company employed a contractor to construct "under the general supervision of the chief engineer of the company," a portion of its road; and the sub-contractors and their employees committed various trespasses and injuries on the lands of plaintiffs. *Held*, that the company, not having directed the acts complained of, nor having any control over the persons who committed them, and the injuries not being the natural result of the work contracted to be done, plaintiff could not recover of the company; notwithstanding the statutes provided that the company should be liable "for trespasses and injuries to lands and buildings adjoining or in the vicinity of its road, committed by a person in its employ or occasioned by its order." The statutory provision does not embrace the acts of contractors.

ACTION to recover damages for trespass upon and injury to plaintiffs' lands, through which defendants' railroad was located. The acts complained of were the building of a tote road through plaintiffs' lands, outside the location of the railroad; also the kindling of fires and negligently permitting them to spread and burn plaintiffs' timber, and the taking of timber for building hovels and camps. The opinion states the case.

I. & G. F. Granger and Madigan & Donworth, for plaintiffs.

J. W. Emery and C. P. Stetson, for defendants.

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APPLETON, C. J. In 1850, the defendant corporation obtained a charter to build a railroad from Bangor to Mattawamkeag, and thence to the boundary line of New Brunswick. The charter expired several times, but was revived from time to time, and, ultimately, December 31, 1872, was fixed for the final completion of the road.

On 7th August, 1865, the defendant corporation entered into a contract with Pierce & Blaisdell for the construction of a railroad from Bangor to St. John, in New Brunswick. It was specified therein that the work should "be constructed under the general supervision and direction of the chief engineer of said company, as required by the contract and specification;" and that the railroad was "to be built on the line as located, or to be located and marked out by the engineers of the company."

This contract, by the consent of the defendant, was assigned by Pierce & Blaisdell to the International Railway Construction and Transportation Company. On 24th May, 1869, this company contracted with Brooks & Ryan "to construct, build, complete and finish in a good, substantial and workmanlike manner, under the superintendence of the chief engineer of the E. & N. A. R. Co., for the time being," all the work within certain limits defined in said contract, at a certain sum per mile. Brooks & Ryan were to make good any damages to the adjoining lands caused by blasting and removing fences, etc.

On November 1, 1869, Brooks & Ryan contracted with Riley & Bunston for all the grading, etc., of the portion of the railway between stations No. 650 and No. 746, the work to be done in accordance with the contract of May 24, 1869, between said International Railway Construction and Transportation Company and said Brooks & Ryan. There was likewise a similar contract between Brooks & Ryan and Wiseman for the grading between stations No. 800 and No. 854.

The acts of which complaint is made, and for which damages are sought to be recovered, are those of Riley & Bunston and of Wiseman, or of those in their employ. The relation of master and servant did not exist between them and the defendants. They were not under the direction and control of the defendants. They were not employed and could not be dismissed by the defendants. They were sub-contractors or the servants of sub-contractors. The sub-contractors were responsible to those with whom they had contracted, and their servants to those in whose service they were laboring.

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When the contract is to do an act in itself lawful, it is presumed it is to be done in a lawful manner. Unless, therefore, the relation of master and servant exists, the party contracting is not responsible for the negligent or tortious acts of the person with whom the contract is made, especially if those acts are outside of the contract. If the injury was the natural result of work contracted to be done, and it could not be accomplished without causing the injury, the person contracting for doing it would be held responsible. *Butler v. Hunter*, 7 H. & N. 826. In *Reedie v. The London & N. W. R. Co.*, 4 Exch. 244, a company empowered by act of parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractors or workmen for incompetence. The workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath the bridge, by allowing a stone to fall upon him. It was held, in a suit by the administratrix, that the company was not liable. In *Overton v. Freeman*, 73 E. C. L. 866, A contracted with parish officers to pave a certain district, and entered into a sub-contract with B, under which the latter was to do the paving of the street, the materials being supplied by A and brought to the spot in carts. Preparatory to paving, the stones were laid by laborers, in the employ of B, on the pathway, and there left unguarded during the night, so as to obstruct the same. The plaintiff fell over them and was injured. It was held that B was responsible for the negligence, and not A. "I think," says MAULE, J., "the present case falls within the principle of those authorities which have decided that the sub-contractor, and not the person with whom he contracts, is liable civilly, as well as criminally, for any wrong done by himself or his servants in the execution of the work contracted for." In *Peachey v. Rowland*, 76 E. C. L. 181, the defendants contracted with certain individuals to construct a drain in a public highway, who employed one C to fill in the earth over the brick work, and to carry away the surplus. C left the earth so much raised above the level of the road that the plaintiff, driving by in the dark, was thereby upset and injured. It was held that the defendants were not responsible for the negligence of C. The defendant employed somebody to do what might be done in a proper and safe manner. It was done negligently and improperly, and the plaintiff was injured, but it was not thus done by the defendants, nor at their instance, and they were not held responsi-

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ble. So in the case at bar, the negligent or tortious acts of the sub-contractors or of their servants were not the acts of the defendants, and if not their acts, nor done by their procurement, the sub-contractors, or the servants committing them, alone are liable.

In conformity with these views are the decisions in this country. In *Blake v. Ferris*, 5 N. Y. 48, it was held that the defendants, who had a license from the city of New York to construct at their own expense a sewer in a public street, and who had engaged another person to do it by contract, to construct it at a stipulated price for the whole work. were not liable to third persons for any injury resulting from the negligent manner in which the sewer was left at night by the workmen engaged in its construction. The doctrine there held was, that the immediate employer of the servant, whose negligence occasions the injury, is alone responsible for the negligence of such servant. These views were affirmed in *Pack v. Mayor, etc., of New York*, 8 N. Y. 222. In *Kelly v. Mayor, etc., of New York*, 11 id. 432, the corporation of the city of New York had ordered a street to be graded, and contracted with a person to do the grading. It was held that they were not liable for damages occasioned by the negligence of the person who had contracted to do this work, or of the laborers in his employ. In *Clark v. Vermont and Canada R. R. Co.*, 28 Vt. 103, and in *Pawlet v. The Rutland and Washington R. R. Co.*, 28 id. 297, it was held that the defendants were not liable for the negligent or tortious acts of the servants of those who had contracted to do certain work for these corporations; that no privity existed between such servants and the corporations. "Though it may be assumed in the case before us," remarks BENNET, J., in the last-named case, "that a public nuisance had been committed by the servants of the sub-contractor, and a particular injury has resulted therefrom to Phelps, and for which the town of Pawlet had been compelled to make satisfaction, yet we cannot discover any privity existing between the defendants and the employees of the sub-contractor. The contract made for the building of the abutments to the bridge was for a lawful purpose, and in no way involved the commission of a wrong, and the employees of the sub-contractor were not the servants of the defendants nor under their control." In *Cuff v. The Newark and New York R. R. Co.*, 9 Am. Law Reg. N. S. 541, the question under discussion was very carefully considered and examined by the supreme court of New Jersey, and with like conclusions. "The rule is now firmly

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established," remarked *DEPUE, J.*, "that when the owner of lands undertakes to do a work which, in the ordinary mode of doing it, is a nuisance, he is liable for any injuries which may result from it to third persons, though the work is done by the contractor exercising an independent employment and employing his own servants. But when the work is not in itself a nuisance, and the injury results from the negligence of such contractor or his servants in the execution of it, the contractor alone is liable, unless the owner is in default in employing an improper and unskillful person as the contractor."

In *Callahan v. Burlington & Missouri River R. R. Co.*, 23 Iowa, 562, the plaintiff sought to recover compensation for damage done to his timber, and by a fire negligently set by the employee of a sub-contractor with the defendant corporation, for the purpose of clearing the way of trees, logs, brush, and rubbish. The contract provided that the way should be cleared of all trees, etc., by removal or burning, as the engineer should direct, before the grading should be commenced. The engineer ordered the burning, which, by the negligence of the person who set the fire, escaped on the plaintiff's land, doing there much injury, and the question presented was whether the railroad corporation was responsible for the negligence of a servant of a sub-contractor. In delivering the opinion of the court, *BECK, J.*, says: "If the person sought to be charged under the rule as employer did not contract with the party committing the wrongful act for his labor or services, and is not directly liable to him for compensation for such labor or services, and has no such control over him as will enable the employee to direct the manner of performing the labor or services, he is not liable for the wrongful act of the agent or servant. In order to create the liability, it is especially necessary that the control of the employee over the servant should be of such a character as to enable him to direct the manner of performing the services, and to prescribe what particular acts shall be done in order to accomplish the acts intended."

The same views have received the sanction of the highest judicial tribunals in Ireland. In *Gilbert v. Halpin*, 3 Irish Jurist, N. S. 300, the plaintiff, as owner of the schooner *Paddy*, brought an action against the defendant as secretary to the commissioners empowered to improve the harbor of Wicklow, to recover damages for its loss by reason of the negligence of commissioners, who had caused to be placed certain piles, etc., and neglected to place, or caused to be

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placed, any light, or to use any other reasonable precaution to guard vessels from being driven thereon.

The defendants pleaded, among other pleas, that they committed the execution of the work to their contractor, John Killien, and that at the time, etc., the said piles were still in the possession and under the control of the said Killien.

GREEN, B., in delivering his opinion, says: "I think the case falls within the rule that the contractor, and not the employee, ought to be liable."

"There is a plain difference," remarks RICHARDS, B., "between the case of master and servant, and that of employee and contractor. The employee was authorized to perform the work, and he authorized the contractor. No man would drive down piles in a navigable river, without being authorized. Therefore, I think it was the contractor's duty to have apprised his employer that this work had come to such a stage that it was necessary to get lights to prevent accidents. It was not to be expected that the commissioners would be on the ground on all occasions to see what might be required to guard against danger. The contractor failed in performing his duty, and I think he ought to be liable." "The question," says PENNEFATHER, B., "is, who is liable. If the contractor, the commissioners are not liable, for it is clear, from all the cases, that if the contractor is liable the employee is not. It appears to me, that if it was the duty of the contractor to put these lights, his employees were not bound." "The principle of law is clear," remarks PRIGOT, C. B., "that when a person is engaged by contract to do a certain work, the contractor and not the employee is liable for this."

Such, too, is held to be the law in Scotland. In *McLean v. Russell, McNee & Co.*, 9th March, 1850, 22 Jur. 394, it was decided that when a person contracts with one man to do a piece of work, and the latter sub-contracts with another, the sub-contractor alone is liable for any damage committed in the course of the work by him." This view of the law was again sustained by the same court in *Shield v. Edinburgh & Glasgow Railway Co.*, 28 Jur. 539.

The plaintiff, in support of this suit, relies upon the case of *Bush v. Steinman*, 1 B. & P. 404; the case was this: A, having a house by the roadside, contracted with B to repair for a stipulated sum: B contracted with C to do the work; C with D to furnish the materials; the servant of D brought a quantity of lime to the house, and placed in the road, by which the plaintiff's carriage was over

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turned. *Held*, that A was answerable for the damage sustained. Without particularly examining the reasoning of the court, it is sufficient to say that it has been long since overruled in England and in this country, as will abundantly appear by the cases cited. It is true the case is cited with approbation in *Lowell v. Boston & Maine Railroad*, 23 Pick. 24, but subsequently, upon an elaborate and careful review of the authorities, it was overruled in *Hilliard v. Richardson*, 3 Gray, 349. It can no longer be deemed an authority on the other side of the Atlantic.

The next case cited in support of this claim is *Lowell v. B. & M. R. R.*, 23 Pick. 24, but so far as that rests upon *Bush v. Steinman*, as has been already seen, it has been overruled. "The accident" in that case, observes THOMAS, J., in *Hilliard v. Richardson*, "occurred from the negligence of a servant of the railroad corporation, acting under their express orders. The case, then, of *Lowell v. Boston & Lowell Railroad* stands perfectly well upon its own principles, and is clearly distinguishable from the case at bar. The court might well say, that the fact of Noonan, being a contractor for this section, did not relieve the corporation from the duties or responsibility imposed on them by their charter and the law, especially as the failure to replace the barriers was the act of their immediate servant, acting under their orders." The defendants in the present case would be liable for any and all wrongful acts done by their "immediate servant, acting under their orders." They should not be held responsible for the torts of a contractor engaged to do a specified work, lawful in itself, which might be performed without interfering with rights of others, nor for the torts of his servants, whom they never employed, over whom they had no control, and whom they could not discharge.

In *Wyman v. Penobscot & Kennebec R. R. Co.*, 46 Me. 162, the train by which the injury was caused was "run under the direction of the company and under their control," and it was, consequently, held liable. In *Veazie v. Penobscot R. R.*, 49 Me. 119, the plaintiff town sought to recover of the defendant corporation the amount it had been compelled to pay in consequence of a defect in a highway occasioned by their neglect. The injury, it is stated in *Phillips v. Veazie*, 40 Me. 98, was occasioned "by the acts of the Penobscot Railroad Company, in constructing their road over that of the defendants." The decision in *Veazie v. Penobscot Railroad Co.* is placed on the ground that the work causing the injury was done

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"according to the plans and directions of the chief engineer of said company." It is undoubtedly true, that when the contractor is to follow the directions of an engineer of the contracting corporation, and he is directed by such engineer to do an unauthorized and illegal act, the corporation, thus acting by its agent, would be held liable. But if the engineer gives no such directions, and the tortious acts of the contractor or of his servants are of his or their mere motion, and without such direction or authority, it is difficult to perceive why a railroad corporation, in such case, should be held any more liable for such torts of a contractor than an individual, or a city, or any corporation. If the contract is a legal one, the acts contracted to be done are legal, the wrongful acts of the contractor are his own, and not those of the party with whom the contract is made. It is different when the relation of master and servant exists.

The case, therefore, of *Veazie v. Penobscot Railroad Co.* is in accordance with all the authorities, if these wrongful or negligent acts were done by the specific direction of their engineer.

The other ground upon which the decision is placed, that "the company must be responsible, whatever contracts they may make," for the torts of those with whom they contract, can hardly be sustained to such an extent. The authorities already cited abundantly show that for the neglects and torts of contractors or their servants, railroad corporations are not to be governed by other or different rules than those applicable to other corporations or to individuals.

The fact that it is specified in the original contract with *Pierce & Blaisdell* that "the work shall be constructed under the general supervision of the chief engineer of said company, as required by this contract and specifications," does not necessarily render the defendant corporation liable for whatever the contractor or their servants may wrongfully do. The corporation is not to be held for an illegal act not contracted to be done, nor directed by their engineer, and in no way sanctioned by corporate action. In *Steel v. The Southeastern Railway Co.*, 81 E. C. L. 550, the work was to be done by the contractor according to plans prepared by and under the superintendence of the company's surveyor, yet the railway company was held not responsible for any injury resulting to a third person, from the negligent manner in which the work was done by such contractor. It was not caused by the company or by any servant in their employ. In *Kelly v. Mayor, etc., of New York*, 11

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N. Y. 435, the work was to be done "under the direction and to the entire satisfaction of the commissioner of repairs and supplies, and the surveyor having charge of the work," yet the city was held not responsible for damages caused by the negligences of workmen in the employ of the city. "The clause in question," observes SELDEN, J., "clearly gave the corporation no power to control the contractor in the choice of his servant. That he might make his own selection will not be denied. The right of selection lies at the foundation of the responsibility of a master or principal for the acts of his servant or agent." To the same effect was the cases of *Pack v. Mayor, etc., of New York*, 4 Seld. 222; *Cuff v. N. & N. Y. R. R. Co.*, 9 Am. Reg. N. S. 541. In *Hobbit v. The London & N. W. Ry. Co.*, 4 Exch. 253, the company by their contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetence. "Our attention," observes ROLFE, B., "was directed, during the argument, to the provisions of the contract, whereby the defendants had the power of insisting on the removal of careless or incompetent workmen, and so it was contended they must be responsible for their non-removal. But the power of removal does not seem to vary the case. The workman is still the servant of the contractor only, and the fact that the defendant might have insisted on his removal if they thought him careless or unskillful, did not make him their servant."

Though a person employing a contractor is not responsible for the negligence or misconduct of the contractor or his servants in executing the act, yet if the act is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons for damages sustained by such wrong-doing. *Ellis v. Sheffield Gas Consumer Co.*, 75 E. C. L. 767. So if, in the present case, the contract was to do a wrongful act, the defendants must be held liable for damages occasioned thereby. Or, if the defendants' engineer directed the contractors to do what was illegal and unauthorized, as by working outside of the limits of the true location, the defendants must be held liable for any trespasses thus committed.

By R. S. 1857, chapter 51, section 23, "Legal and sufficient fences are to be made on each side of land taken for a railroad, when it passes through inclosed or improved land or wood-lots belonging to a farm before the construction of the road is commenced, and they are to be maintained and kept in repair by the corporation. For any

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neglect of it during the construction of the road, and for injuries thereby occasioned by its servants, agents, or contractors, the directors are, jointly and severally, personally liable."

By section 25, "The corporation is liable for trespasses and injuries to lands and buildings adjoining, or in the vicinity of its road, committed by a person in its employ, or occasioned by its order, when the party injured has, within sixty days thereafter, given notice of it to the corporation; but its liability does not extend to acts of willful and malicious trespass.

An individual in the employ of the company is not a person contracting with the company to do and perform a certain contract. The difference between the contractor and servant, or employee of the company, is recognized by the statute. The provisions of section 25 apply only to those of the corporation, or those acting under its orders.

The provisions of section 23 embrace contractors. As contractors are included in one section, and omitted in the other, we must deem it to have been for some purpose, and that when they are omitted, it was not the intention of the legislature that they should be included.

We think, therefore, that the corporation is not to be held responsible under this section for the torts of contractors or the servants of contractors.

[The remainder of the opinion is not of general interest, being devoted entirely to the question as to whether, in fact, the road had been built outside of the location, and to determine this question the case was ordered.]

To stand for trial.

FARRAR, plaintiff, v. PEARSON.

(87 Me. 551.)

Partnership — action of account.

Two partners cannot maintain a joint action of account against a third, to recover their share of the net profits received by him, in the absence of an independent promise or of an adjustment of the partnership matters.

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ACTION of account brought by Farrar and Webber, plaintiffs, jointly, against Pearson, defendant. At the trial, it appeared that plaintiffs and defendant were partners in 1867 engaged in the hunting business, each partner to share equally in the profits; that they killed several moose, some of which were sold by defendant, the proceeds of which, together with other funds collected by him, he had not paid over; and that defendant told plaintiff Farrar he would pay him as soon as he had the money, and told plaintiff Webber that he had received no more money than he had paid out. Defendant moved a nonsuit on the ground that plaintiffs could not jointly maintain the action. The motion was denied, and defendant was ordered to account. Defendant alleged exceptions.

P. G. White, for plaintiffs.

A. Sanborn, for defendant.

APPLETON, C. J. This is an action of account. "Account render," observes GIBSON, J., in *Geary v. Cunningham*, 10 S. & R. 230, "is at best but a clumsy remedy, and so greatly inferior to a bill in equity, that it is in England abandoned altogether." It is, however, still retained in this State.

At the trial at *nisi prius*, the presiding justice rendered the interlocutory judgment, *quod computet*, to which exceptions were taken. The question presented is, whether the plaintiffs, upon the evidence produced, were entitled to this judgment.

The plaintiffs and defendant were partners. There has been no adjustment of the affairs of the partnership, and no balance ascertained. The interests of the several partners *inter sese* were several. There is nothing showing or tending to show any interest on the part of these plaintiffs, which alone would entitle them to maintain a joint action against their copartner. There is no express promise proved, and nothing from which one can be implied.

In *Whelen v. Watmough*, 15 S. & R. 153, this form of action was brought by one partner against two, and it was held not to be maintainable unless a joint liability was shown. "When the objection was first made, that there could not be a verdict and judgment for the plaintiff *quod computet*, unless the jury found a joint liability of the defendants to render an account, I was impressed," observes DUNCAN, J., "with an opinion that it was unanswerable. It seemed to me that it would be unsettling the first foundations, to say that

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one man should be answerable for another, when there was no express contract, and when, from the nature of the consideration, there could be none implied. I did not then believe it to be law, and so instructed the jury, that on the plea of never bailiffs or receivers of the plaintiffs, unless they found that this was a house of partnership, consisting of two parties, the plaintiffs one and the defendants the other, then verdict should be for the defendants." This ruling was sustained and judgment entered on the verdict.

The same reasoning is still more applicable when there are two partners suing a third. The defendant may owe one and not the other, or one more than the other. The plaintiffs cannot have several judgments in accordance with the different amounts the defendant may owe them severally. They have no joint cause of action, and, therefore, they cannot recover, though the same amount was due each. "Neither," observes GOULD, J., in *Beach v. Hotchkiss*, 2 Conn. 425, "can one of the three (when the partnership consists of that number) recover against either of the others singly, since the mutual claims of any two of them cannot be completely adjusted without deciding upon those of the third." The only mode by which the affairs of a partnership, consisting of three or more, can be settled by suit, is by bill in equity, where all the partners are made parties to a suit, in which their respective rights can be adjusted. .

In *Portsmouth v. Donaldson*, 32 Penn. 202, the precise question here presented arose. It was there held that one partner could not maintain this action against his two copartners jointly, without showing a joint liability on their part to account. "The action of account render," observes STRONG, J., in delivering the opinion of the court, "is founded upon contract, and the engagement between the partners is, that each partner shall account to every other for himself, and not for his copartner. It is a several liability, and no two partners are responsible to another jointly."

In case of a tenancy in common, each tenant may bring his several action, but two cannot join against a third, for they have no joint interest. *Sturton v. Richardson*, 13 Mees. & Welsb. 17.

Had the plaintiffs brought assumpsit, the affairs of the firm remaining unadjusted, and no balance agreed upon, and no express promise proved, the plaintiffs could not recover. In such case the law will not imply a promise.

Exception sustains l.

STEARNS AND WIFE, plaintiffs, v. SAMPSON.

(50 Me. 508.)

Landlord and tenant—right of landlord to enter and expel tenant. Assault.

When a tenancy has been legally terminated, the landlord may enter peaceably upon the premises; and, having so entered, he may remove the tenant therefrom, using such force as would sustain a plea of *molliter manus impotuit*, and he may remove the tenant's goods, if the tenant, after sufficient opportunity, neglects to do so, using due care and caution in their removal, and depositing them in a near and convenient place. And, if, under such circumstances, the landlord bursts open a door, which the wife of the tenant has wrongfully fastened, removes the doors and windows, which make it uncomfortable for her to remain, and brings a dog into the house which, by barking, annoys her, such acts do not constitute an assault. Acts which embarrass and distress do not constitute, although they may aggravate, an assault.

ACTION in trespass brought by George B. Stearns and wife against George Sampson. The opinion sufficiently states the case at the trial.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions and also filed motions to set aside the verdict as being against law and the weight of evidence.

J. W. Bradbury & L. Clay, for plaintiffs.

A. Libby, for defendant.

APPLETON, C. J. The writ in this case contains three counts,—for trespass *quare clausum*, for an assault and battery upon the female plaintiff, and for taking and carrying away her goods.

The presiding justice, in his charge to the jury, assumed that the legal title to the premises upon which the alleged trespasses were committed, was in the defendant; that George B. Stearns had been a tenant therein; that the defendant had given him legal notice to quit; that his tenancy had been terminated, and that he thenceforth became a tenant at sufferance.

The defendant, these facts being unquestioned, after having given the plaintiff ample time in which to remove his goods and family,

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on the 9th of December, entered into the premises in controversy, which had been and were then occupied by the plaintiffs. The plaintiffs' witness, Mrs. Best, gives the following account of the defendant's entry: "December 9th, as I was passing through the entry, the bell rang. I opened the door. Being in my morning dress, I apologized. Mr. Owen was with Mr. Sampson; he introduced him to me. Without my asking him, he stepped in, and then into the parlor and asked for mother. I went and called her, and then went to my room to my baby. She soon called me. Mother said, Mr. Sampson has come to move the furniture. Owen went into the parlor. Mother was then in the parlor. Mr. Sampson said he had come to clear the house, and for us to leave at once," etc.

The defendant's testimony on this point was as follows: "On the 9th December I went to the house with Mr. Owen, and rang the door-bell. Mrs. Best came to the door and invited Mr. Owen and myself into the house, and showed us into the south-west parlor. I asked for Mrs. Stearns, and she called her. Mrs. Stearns came in five minutes perhaps, or a little more. I then said to her I had come to take possession of the house; that I had consulted Mr. Paine and Mr. Sewall, and that they had told me to come to the house and take possession of it. She remonstrated," etc.

Now, what, after this entry, were the relations of the parties? The defendant had, without force or violence, entered into his own house, in which the plaintiffs, their tenancy having been legally terminated, still remained? What were the respective rights and duties of the parties? The plaintiffs, without title, their tenancy duly terminated, were there without right. Their continued possession was wrongful. The defendant was there by right in the possession of his own estate, having entered peaceably and without resistance on the part of the wrong-doing tenant. Both cannot rightfully remain. One or the other should quit. Can there be any doubt whose duty it was to leave? If the defendant could rightfully remain, the continued occupation of the plaintiffs was wrongful; as the plaintiffs could not rightfully remain, and the defendant could, and as one should quit, if he failed to quit voluntarily, there remained only the right of removal.

That right would be the same as where any person, having entered a dwelling-house, refuses to quit when requested. If there is not this right of removal, then any knave may enter, remain and refuse to quit, and there is no mode of dispossession. It is true every

man's house is his castle. But his neighbor's house, where he has no legal right to be, is not his castle. The owner, in his castle, may remain, for it is his castle. The trespasser in his neighbor's castle must remove or be removed. If it be not so, the rights of the wrong-doer are equivalent to those of the owner, rightfully in possession of his own.

The facts as to the entry on 9th December were not in dispute. Upon these facts the presiding justice instructed the jury as follows: "There is no controversy, that if he (the defendant) had obtained peaceable possession, he had a right to remain there, the property being his at the time. But what was the nature of his possession? Did he go there for the purpose of deception, merely to call as a friend on a visit, or did he go there with the intention, after making such an entry, to forcibly expel the inmates? If that was his design, then the entry would not be recognized, in law, to give him a peaceable possession." As the defendant had a right to enter peaceably into his own house, and being there to remain, and to remove the tenant wrongfully remaining, it does not affect the rights of the parties, whether he disclosed or concealed his intention to remove his tenant. Nor is it material whether he entered with such intention, or formed such intention after his entry, if his entry was peaceable, and without force. "It is not necessary," remarks Lord TENTERDEN, in *Butcher v. Butcher*, 7 B. & C. 399, 14 E. C. L. 59, "that the party who makes the entry should declare that he enters to take possession; it is sufficient, if he does any act to show his intention." In the same case, BAILEY, J., says, "I think that a party, having a right to the land, acquires by entry the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of his entry, wrongfully continues upon the land." The defendant might instantly bring trespass against the plaintiff wrongfully remaining in his house, or he might remove her. As the law gave him a right to enter peaceably and remove his tenants and their goods, if it could be done without a breach of the peace, the intention to do what the law authorizes cannot make an entry with such intent wrongful.

The first branch of the instruction was correct. The verdict should be set aside as against law, the evidence on both sides showing the entry to have been peaceable.

If there is any evidence to which the latter part of the instructions can apply, then the exceptions should be sustained; for a peaceable

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entry cannot be metamorphosed into a forcible one by reason of an existing and concealed intention on the part of the party entering to do, after entry, what by law he was legally authorized to do.

The court instructed the jury that the plaintiffs could not recover on the count for breaking and entering. The defendant, entering upon premises wrongfully withheld by the tenant, could not be deemed a trespasser. But if he was not a trespasser in entering into his own house, whatever his purpose or intention, then, being there, he might remove doors or windows. If the plaintiffs could not maintain trespass *quare clausum* for his entry, neither could they for his acts after such entry. *Meador v. Stone*, 7 Metc. 147. "The right of the plaintiffs to the possession of the house had terminated by their failure to pay rent, and the notice given to them by the defendant to quit the same. In this state of the facts," observes DEWEY, J., in *Mugford v. Richardson*, 6 Allen, 76, "the defendant had the right to enter upon the premises and take out the windows of the same. . . . Being thus in peaceable possession of a portion of the tenement, the court properly instructed the jury that if the female plaintiff undertook to prevent him from taking out the windows, he had the right to use as much force as was necessary in order to overcome her resistance." In *Harris v. Gillingham*, 6 N. H. 11, the owner of the land, after requesting his tenant to leave, upon his refusal entered, tore down the chimneys, and put the building in an uninhabitable condition, for doing which the tenant brought an action of trespass *quare clausum*. "We are of opinion," say the court, in delivering their opinion, "that the disturbance done to her possession by putting the house in a situation which compelled her to leave it, did not make them trespassers *ab initio*, because she had no right to be there against the will of D. Gillingham, the owner of the land." *Erwin v. Olmstead*, 7 Cow. 229; *Wilde v. Contillac*, 1 Johns. Cas. 123; *Hyatt v. Wood*, 4 Johns. 150; *Ives v. Ives*, 13 id. 235.

Neither can the acts complained of be deemed to constitute an assault upon the female plaintiff. As they were acts the defendant could legally do, they cannot become the basis of a suit or a foundation for a claim for damages.

The right of the plaintiffs to occupy having been legally terminated, they would have a reasonable time in which to remove their goods, after which the landlord might enter and remove them, storing them safely near by, provided it were done in a careful manner. *Rollins v. Mooers*, 25 Me. 192. In case of a mortgage, the entry may be

made by the mortgagee, before condition broken, without the consent and against the will of the mortgagor, and the mortgagee may remove the personal property of the mortgagor, provided it be done in a careful and convenient manner, and to a safe place, without being liable in an action of trespass therefor. *Allen v. Bicknall*, 26 Me. 426. In *Whitney v. Sweet*, 2 Fost. 10, a legal notice to quit on 20th October was given. "This," observes BELL, J., "was a sufficient notice, and the tenancy was by that notice terminated on the 20th. After that day the plaintiff was a trespasser; his goods were *damage feasant*, and the owner had a clear and perfect right to go into the house with suitable assistants, and then, peaceably and quietly, without breach of the peace, remove the goods to a near and convenient distance, and there leave them for the use of the owner, doing them no unnecessary damage." These views have been fully sustained by the supreme court of Massachusetts in repeated decisions. *Curtis v. Galvin*, 1 Allen, 215; *Mugford v. Richardson*, 6 id. 76. Indeed, after the legal termination of a tenancy, as in the case at bar, the tenant "could have no longer any other rights than those of ingress, egress and regress for a reasonable time, to take care of and remove his property." *Moore v. Boyd*, 24 Me. 242. Those rights the plaintiffs had in the most ample manner, had they seen fit to exercise them.

There is in the declaration a count for an assault and battery upon the female plaintiff. In reference to this branch of the case, the following instructions were given. "Was there a trespass committed upon the female plaintiff? She is the only one who seeks for damages. Whatever may have been the injury inflicted upon the other inmates of that house, she can recover on this suit only for that which was inflicted upon her. In order to constitute an assault, it is not necessary that the person should be touched, but there should be certain indignities. In the language of one of the decisions, if the plaintiff was embarrassed and distressed by the acts of the defendant, it would amount in law to an assault." The acts and indignities which from the charge might constitute an assault, were the bursting open a door, which the plaintiff had no right to fasten, and the inconveniences resulting from taking off the doors and taking out the windows, which made it uncomfortable for the female plaintiff to remain, where remaining, she was a trespasser. So the bringing a blood-hound by the defendant into his house, which is proved to have barked, but not to have bitten, and the

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making a noise therein, with other similar acts, it was contended, would amount to an assault and trespass, and of that the jury were to judge." Now such is not the law. An assault and battery is clearly defined by Revised Statutes, chapter 118, section 28, thus: "Whoever unlawfully attempts to strike, hit, touch, or do any violence to another, however small, in a wanton, willful, angry, or insulting manner, having an intention, and existing ability, to do some violence to such person, shall be deemed guilty of an assault; and if such attempt is carried into effect, he shall be deemed guilty of an assault and battery." Now the removal of a door or windows, of the owner in possession, would constitute no assault. Indeed, as has been seen (6 Allen, 76), the owner would, in attempting it, have the right to use as much force as was necessary to overcome the resistance of the unlawfully resisting and trespassing tenant. Acts which may embarrass and distress do not necessarily amount to an assault. Indignities may not constitute an assault. Acts aggravating an assault differ materially from the assault thereby aggravated. Insulting language or conduct may aggravate an assault, but it is not an assault. So the acts of the defendant, in taking out the windows of his own house, in a bleak and cold day, might distress one unlawfully occupying, and illegally refusing to quit his premises, but they could in no sense be regarded as an assault upon her. One may be embarrassed and distressed by acts done "in a wanton, willful, angry, or insulting manner," where there is no "intention, nor existing ability to do some violence" to the person, and yet there be no assault. The instruction on this point is equally at variance with the common law, and the statute of the State.

The plaintiffs rely mainly, in support of their suit, upon the case of *Newton v. Harland*, 39 E. C. L. 581, in which it was held that where a tenant remains in possession after the expiration of his term, the landlord is not justified in expelling him by force in order to regain possession. But the case relied upon is different in its facts from the present. There physical force was used to enter and expel the tenants. In the case at bar the entry was peaceable. The court in that case were divided. COLTMAN, J., in delivering his opinion, says: "I am not aware that any doubt exists that, after the entry made, he (the landlord) may turn any ordinary trespasser off the land; and I am unable to see any principle which should prevent him from treating his tenant at sufferance in the same way, for

such tenant is a mere wrong-doer. Co. Litt. 576; *Pike & Hassen's Case*, 3 Leon, 233; *Sir Moil Finches' Case*, 2 id. 143."

"For the preservation of the peace, the law will furnish forcible entry; but the tenant at sufferance, being himself a wrong-doer, ought not to be heard to complain in a civil action for that which is the result of his own misconduct and injustice.

"The distinction between the civil rights of a person forcibly turned out of the possession of land, and the penal sanctions by which he is protected from being forcibly dispossessed, are drawn in a marked way in the cases in our old books relating to the statutes of forcible entry. Although by those statutes all forcible entries were prohibited, even by those who had title to enter, yet the party dispossessed could maintain no action on the statutes. This is pointedly laid down in the Year Book, 9 H. 6, 19; 15 H. 7, 17; F. N. B. 248 H."

The opinion of the majority in this case, too, is alike adverse to the prior as well as the subsequent decisions of the English courts on this question.

In *Taunton v. Costar*, 7 D. & E. 427, Lord KENYON uses the following language: "Here is a tenant, from year to year, whose term expired upon a proper notice to quit, and because he holds over in defiance of law and justice, he now attempts to convert the lawful entry of his landlord into a trespass. If an action of trespass had been brought, it is clear the landlord could have justified under a plea of *liberum tenementum*. If, indeed, the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term. There is not the slightest pretense for considering him as a trespasser in this case." It is to be borne in mind, as was held in *The King v. Wilson*, 8 D. & E. 358, the words *manu forti* are understood to import something criminal in their nature; something more than is meant by the words *vi et armis*. In *Harvey v. Bridges*, 14 M. & W. 437, PARK, B., uses this language: "If it were necessary to decide it, I should have no difficulty in saying that when a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, though the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to

doubt, that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though in so doing, a breach of the peace was committed." In *Pollen v. Brewer*, 97 E. C. L. 371, ERLE, C. J., after stating the modes in which the tenancy was terminated, says: "I am of opinion that either of these was a sufficient intimation to the plaintiff that he was no longer tenant at will, and that his continuance of the possession was without a shadow of right, and, therefore, that the defendant was justified in treating him as trespasser and removing him from the premises. There was abundant evidence that, at the time of the expulsion, the plaintiff was on the premises without any right."

In *Burling v. Read*, 63 E. C. L. 907, Lord CAMPBELL says: "The plaintiff is a trespasser. What right can he have to prevent the owner of the soil from pulling down the house?"

The authorities in Massachusetts are in conformity with the later English authorities on this subject. *Meader v. Stone*, 7 Metc. 147. "By the principles of the common law," observes WILDE, J., in *Fifty Associates v. Howland*, 5 Cush. 214, "some degree of force is allowed in expelling an intruder into a man's lands or tenements, who refuses to quit, although he has no right to the possession. The owner is not justified to use such degree of force as would tend to a breach of the peace, but he is allowed to use such force as would sustain a plea of justification of *molliter manus impositus*." In *Curtis v. Galvin*, 1 Allen, 215, it was held, that a tenant at sufferance could not maintain an action against the owner of the premises, who entered upon and expelled him, and removed his furniture. In *Mugford v. Richardson*, 6 id. 76, the owner of a tenement entered the same without objection, as in the present case, and removed the windows. The female plaintiff attempted to prevent their removal. The court held the defendant was justified in using sufficient force to overcome her resistance.

In New York, it was early determined that, if a person, having a legal right to enter upon land, enters by force, though liable to indictment, he is not liable to a private action for damages at the suit of the person whom he turns out of possession. *Hyatt v. Wood*, 4 Johns. 150; *Ives v. Ives*, 13 id. 235. It was held in *Willard v. Warren*, 17 Wend. 257, that, to constitute a forcible entry, there must be something beyond a mere trespass upon the property.

Breaking the door of an outhouse in the actual possession of the plaintiff, by forcing the lock, was decided not to be a forcible entry. But in the case under consideration the entry was peaceable and without force.

The plaintiff, upon the termination of his lease, became tenant at sufferance. In such case the owner of the fee may enter at any time and put an end to his holding. *Reed v. Reed*, 48 Me. 388. In *Allen v. Bicknell*, 36 id. 436, it was held that the mortgagee might enter on the mortgagor by force and remove his goods, and that the mortgage would afford a complete justification. The same principles apply where the tenancy is legally terminated. Indeed, such is assumed to be the law in *Cunningham v. Horton*, 57 Me. 420.

Without determining the effect of a forcible entry on the rights of parties, after the due termination of a tenancy, it seems to be fully settled by the weight of judicial authority, when a tenancy has been legally terminated, that the landlord may enter peaceably upon the premises; that, thus entering, he may remove the tenant therefrom, using such force as would sustain a plea of *molliter manus imposuit*; and that he may remove his goods, if the tenant, after a sufficient opportunity, neglects to do so, using due care and caution in their removal and depositing them in a near and convenient place.

Motion sustained; new trial granted.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

SHERLEY, appellant, v. BILLINGS.

(8 Bush, 147.)

Master and servant — liability of master for willful torts of servants.

A passenger upon defendants' boat was assaulted and injured by an officer of the boat. *Held*, that defendants were liable. (See note, p. 456.)

APPEAL from a judgment entered upon a verdict in favor of the plaintiff. The opinion states the case.

I. & J. Caldwell and Hamilton Pope, for appellants.

Clemmons & Willis, for appellee.

LINDSAY, J. Charles H. Billings, a boy about fifteen years of age, while a deck-passenger on the steamer Ben Franklin, was assaulted and stricken down by an officer of the boat, and, among other injuries received, one of his eyes was totally destroyed.

This suit against Sherley and others, owners of the Ben Franklin, was brought by appellee to recover damages for the injuries thus sustained at the hands of their officer and employee. A trial resulted in a verdict in his favor for the sum of \$4,400. Judgment was rendered upon this verdict, and a motion for a new trial having been overruled, appellants have prosecuted this appeal.

The third clerk of the boat, one Williams, was charged with the duty of collecting the passage-money due from the deck-passengers. While engaged in the performance of this duty he approached Billings and demanded his fare, which was promptly paid. The clerk immediately charged him with having hidden under the boilers, and the charge being denied, the assault was instantly made and the injuries complained of inflicted.

Appellants deny their responsibility as owners of the boat, and employers of this officer, for the consequences of his willful and unauthorized tort, insisting that the act complained of was not done by the clerk in the discharge of any duty imposed upon him by the terms of his employment, nor under authority from them, either express or implied, and that it has not been ratified by them by the retention in their employ of such officer.

They complain that the court below erred as to the law of the case, and not only misinstructed the jury, but permitted improper testimony to be heard and considered.

A brief review of the principles by which the rights of the parties to this action must be determined will enable us the more readily to test the legal accuracy of the instructions given and refused on the trial.

Ordinarily, the master is not liable to answer in a civil suit for the wrongful or tortious act of his servants, unless it is done in the course of his employment. If the servant goes beyond the scope of his employment, he is as much a stranger to his master as to any third person, and his acts can in no sense be regarded as the acts of his master. It is not enough that the trespass be committed while the relation of master and servant exists; nor that the servant is then engaged in the business of his master; he must at the time be acting for him and in his name. The difficulty in this case grows out of the application of these principles to the facts presented by the record. Where there has been no statutory modification of the common law, and where the party injured is a stranger to the master, having no claims upon him for protection from insult or injury, he is no more responsible for the action of the servant, not done with his assent nor within the scope of his employment, than for the actions of a mere stranger.

In this case the appellants are common carriers of passengers. They do not undertake absolutely to insure the safety of those subjecting themselves to their control; but the law holds them to "the

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strictest responsibility for care, vigilance and skill on the part of themselves and those employed by them." They are required to behave toward their passengers "with civility and propriety, and to have servants and agents competent for their several employments, and for the default of their servants or agents in any of the above particulars, or generally in any other points of duty, the carrier is directly responsible." 2 Pars. on Cont. (5th ed.) 225.

Every individual who commits his person to the custody and government of others has the right to expect from them the highest practical degree of care and skill. So, likewise, has he the right to expect protection from injuries or outrages at the hands of strangers or of fellow-passengers, if by the use of reasonable foresight such injuries could have been anticipated and averted. This protection passengers upon steamboats must receive from the officers of the vessels, and it is one of the stipulations of the implied contract between the carrier and the passenger that such protection shall be afforded by these officers. They represent the carrier, are selected by him, and it is his imperative duty to see that the passenger is treated by them with "civility and propriety."

If these officers fail to use reasonable diligence in the protection of the passenger from injuries at the hands of strangers or other passengers the contract is violated, and the carrier can be held responsible for such damages as the injured passenger may have sustained by reason of such failure. To our minds, both the reason and philosophy of the law demands that such contract shall protect the passenger from injuries and insults at the hands of those who, for the time being, are intrusted with the custody of his person.

As held by the supreme court of Maine in a recent case: "The carrier must not only protect his passengers against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and insults of his own servants. If this duty is not performed—if this protection is not afforded, but, on the contrary, the passenger is assaulted and insulted through the negligence or willful misconduct of the carrier's servant—the carrier is necessarily responsible." *Goddard v. Grand Trunk R. R. Co.*, 57 Me. 202; 2 Am. Rep. 39.

A due regard for the safety and comfort of the traveling public demands that the contract between the carrier and his passengers shall be so construed, and in cases of its violation in this regard, that the aggrieved party shall receive adequate compensation for

any injury he may sustain by reason thereof. To the agents the carrier himself selects, and of whose character the public can know but little, is committed the custody of women and children, separated, in many instances, for the time from their natural protectors. To these agents these helpless classes of the community must of necessity look for protection from insult, and security from personal danger. An enlightened public policy requires the courts to so apply well-established principles of law as to secure this protection, and at the same time not to disregard the rights of the carrier.

But as the compensation he receives from the passenger is not only in consideration that he will transport him from one point to another, as may be agreed upon, but of the further fact that, during the time he is so transporting him, reasonable diligence will be used to protect him from insult and injury, it seems to us that it results necessarily that the contract must guarantee immunity from violence at the hands of those whose duty it is to afford this stipulated protection. This conclusion, in our opinion, not only does not conflict with, but is in substantial accord with the principle of law that exonerates the master from responsibility on account of the willful tort of the servant, not committed in the course of his employment, nor while acting without the scope of his authority.

It must be borne in mind that, from the moment the contract between the carrier and passenger begins until it ends, the official actions of the officers of the boat touching the payment of passage-money, or the manner in which the passengers shall conduct themselves, or the enforcement of the regulations prescribed for the government of the vessel — in short, all intercourse between the officers and passengers naturally and legitimately growing out of the relationship existing between them — may properly be said to come within the course of their employment, and their actions in the premises, if legal and proper, are within the scope of their authority.

In this case Williams, the clerk, at the time of the assault, was engaged in collecting from the deck-passengers the passage-money due from them. The amount due from Billings had actually been handed him; but before they separated, and almost simultaneously with the payment, the charge upon the passenger of having hidden under the boilers was made, and immediately thereafter the injuries inflicted. The entire affair was substantially one transaction. An appreciable interval of time may have intervened between the reception of the

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money and the assault, but it cannot be said that the officer was not at the time engaged in the discharge of a prescribed duty. He was charged with the collection of the passage-money from Billings; and whether he had or not the right to inquire as to his conduct in reference to the alleged hiding under the boilers, he was at the time discharging "a supposed or pretended duty."

Such seems to have been the opinion of the judge of the common pleas court, and this was doubtless his reason for refusing to give instructions Nos. 1 and 2, as asked by appellants. These instructions are evidently based upon the theory that the responsibility of the appellants to Billings was no greater than it would have been had the latter been a mere stranger instead of a passenger upon their boat. As has been seen, this theory is incorrect; hence the court did not err in refusing to give those instructions.

The first instruction given upon the motion of the appellee is unexceptionable; the second is a correct exposition of the law, and if objectionable at all, it is because it may be regarded to some extent as abstract; but modified as it is by the third instruction given for appellants, it could not possibly have operated prejudicially to them.

It is complained that it was error to permit that portion of the depositions of the witnesses, Lowry and Ashcraft, in which they detail the remarks they made to Williams when they were rescuing the appellee from his brutal attack, to be read to the jury. These remarks were made during and immediately after the assault, and were essentially a part of the *res gestæ*. They explained the character of the attack, and exhibited, in a clear and striking light, the wickedness and depravity of the agent to whose care and custody the personal safety of the appellee had been intrusted. It was the province of the jury, by their verdict, to compensate the outraged passenger not only for the loss of his eye, but for the mental sufferings caused by the shameful indignities to which he was subjected; and, to enable them to do this, it was necessary that all the particulars of the transaction should be disclosed. It results, therefore, that this evidence was properly permitted to go to the triers of the cause.

This conclusion does not conflict with the rule laid down by this court in the case of *Hallowell v. Hallowell*, 1 Mon. 132. In that case the plaintiff desired to prove "aggravating and provoking language" used by the defendant *after the combat was over*. In this,

the testimony objected to relates solely to the assault and the rescue of the complaining party. There is also this further difference. The opprobrious and insulting language used by Williams to the appellee before and after the assault was of itself a violation of his principal's contract, and went to make up the outrage and injury for which the appellee was entitled to recover. This language could not have been understood if the replies of the two witnesses had been excluded, and it would have been the merest farce to have disconnected what Williams said from the replies made by those who were, at the time, interfering to protect the appellee from his violence.

It cannot be said that the damages are excessive. The jury were instructed that they could not give exemplary damages; and, when all the circumstances of the case are considered, the verdict can scarcely be regarded as compensatory. It appears that, after the injuries were inflicted, neither the master nor any of the officers of the boat (except the two engineers) took any steps whatever to alleviate the sufferings of the appellee, and that he was permitted to remain upon a passenger packet, plying between the cities of Louisville and Cincinnati, without medical or other attention. Such culpable neglect of a passenger, had the carrier been in nowise responsible for the injury, would, of itself, have authorized a recovery. Believing that the law has been correctly administered, and that nothing more than substantial justice has been done, this court will not disturb the finding of the jury.

Judgment affirmed.

NOTE. — See *Bryant v. Rich*, ante, 311, and note, p. 316. — *Rmp.*

COMMONWEALTH, appellant, v. COOK.

(8 Bush, 283.)

Exemption laws — State prerogatives.

An execution was issued on a judgment in favor of the State in an action on a sheriff's bond. *Held*, that the judgment debtors' homesteads were not exempt under the homestead law.

Exemption laws do not apply to the State unless by express words in the enactment.

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SUIT for an injunction.

At the February term, 1868, of the Franklin circuit court, upon a proceeding by motion, the commonwealth recovered a judgment against James B. Cook, sheriff of Trimble county, and the sureties on the bond executed by him, for the collection of the State revenue due from the tax payers of that county for the year 1867, for the sum of \$4,004.41, with interest; and, also, a further judgment for twenty per centum damages, as allowed by law in such cases. An execution was sued out on this judgment on the 5th of November, 1868, and placed in the hands of the sheriff of Henry county for collection; and a levy having been made upon the lands of Cook's sureties, they instituted this suit to enjoin further proceedings under the execution, basing their right to the relief sought upon these two grounds:

First. That Cook, their principal, failed to execute his official bond as sheriff, and to take the oath of office within a month after the time his election ought to have taken effect, as required by section 12, chapter 71, of the Revised Statutes; and that by reason of such failure he vacated his office, and rendered himself ineligible thereto for two years next thereafter, and hence, that the county court of Trimble county had no power to permit him to qualify as sheriff at the time he was permitted so to do; and they insist that in consequence of Cook's failure to qualify within the prescribed time, and the want of power upon the part of the county court at the time it attempted to induct him into office, all its orders on the subject, as well as the bonds executed by Cook to the commonwealth, are absolutely void, and as a logical and necessary sequence that the judgment rendered against them upon one of these bonds, without the service of process, is also void.

The second ground is, that the lands taken under the execution are exempt from levy and sale under the provisions of an act of the general assembly, approved February 10, 1866, and generally known as the "homestead law."

The attorney-general demurred specially to each paragraph of the petition. His demurrer was sustained as to the first and overruled as to the second paragraph. The appellees failing to amend, judgment was rendered in conformity with the principles indicated by the court in its action upon the demurrers. From this judgment the commonwealth has appealed, and the sureties have prosecuted a cross-appeal.

John Rodman, attorney-general, for appellant.

George C. Drone, for appellees.

LINDSAY, J. (After stating facts.) The petition alleges that Cook's election as sheriff ought to have gone into effect on the first Monday in January, 1867, and that he did not qualify and execute his official bond until the 11th of February, more than one month thereafter. It does not state that he was elected at the regular August election, 1866; nor does it mention the date of his election at all; nor is there any light thrown upon this question by the order of the county court, made an exhibit by the petition. This order merely recites that "on the 11th of February, 1867, "James B. Cook produced his certificate of election as sheriff of Trimble county, and moved the court to permit him to enter into bond and qualify as such." No such state of facts is set out by the petition as will necessarily imply that he was elected at such time as rendered it necessary that he should execute his bond, and take the oath of office as early as the first Monday in January, 1867. The petition does allege that his election ought to have gone into effect on that day; but this is a legal conclusion upon the part of the pleader, and not a statement of the facts upon which such conclusion is based. And in the absence of such statements we have no means of determining as to its correctness. We will not assume that the county court permitted Cook to qualify as sheriff after he had forfeited his right to the office, and rendered himself ineligible thereto. Construing the petition more strongly against the pleader, and indulging the presumption that the county court, in a matter over which it had undoubted jurisdiction, conformed substantially to the statutes regulating such proceedings, we conclude that the court below did not err in sustaining the demurrer to the first paragraph of the petition. This conclusion renders it unnecessary to inquire into the other questions presented by the appellees on this branch of the case, as they are all based upon the idea that Cook had forfeited his right to the office of sheriff at the time he was permitted to qualify.

The question raised by the demurrer to the second paragraph of the petition is one upon which there has been no adjudication by this court, and we confess that we have been unable to find a decision by any English or American court upon a proposition exactly anal-

ogous. If the contract or undertaking upon which the judgment was rendered had been executed to any individual or private corporation, there could be no doubt entertained but that a court of equity would interfere to prevent the sale in satisfaction of such judgment of property exempt from levy and sale under the provisions of the "homestead law." But, in this case, the undertaking is to the commonwealth, and to secure the payment of the public revenues. As the government of the State is established for the good of the whole, and can only be supported by means of its revenues, courts in the construction of general laws will not ordinarily apply to the State such as, upon their face, seem to have been intended only for declaring or regulating the rights and remedies of private individuals, and which, if so applied, will have the effect of obstructing or rendering more difficult the speedy collection of the public dues. This rule is founded not only upon the highest public policy, but is warranted by the firmly-established maxim "that general statutes do not bind the sovereign unless expressly mentioned in them." Laws are *prima facie* made for the government of the citizen, and not of the State herself. *State v. Garland*, 7 Ired. 50. In the case of *Divine v. Harvie*, 7 T. B. Monr. 443, this court expressly recognized and upheld this doctrine, declaring that "it is a rule that the commonwealth is not embraced by an act which is made to operate between individuals, unless there is something in the act which shows an intention to subject the State to the same rule." This rule, and the reason therefor, is laid down with great clearness by the supreme court of the United States, in the case of the *United States v. Knight*, 14 Pet. 315, in which this language is used:

"In Bacon's Abridgement, title 'Prerogative,' 3-5, it is said that the general rule is that where an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the king shall be bound by such an act, though not particularly named therein. But where a statute is general, and thereby any prerogative, right, title or interest is divested or taken from the king, he shall not be bound unless the statute is made by express words to extend to him. . . . The doctrine that the government should not, unless named, be bound by an act of limitation, is in accordance with that just cited from Bacon, because if bound, it would be barred of a right; and in all such cases is not to be construed to be embraced unless named, or what would be equivalent, unless the language is such as to show clearly that such was the

intent of the act." The court, continuing, says that this principle has been recognized by the courts of New York, Massachusetts, and other States, and all upon the same ground. "Not upon any notion of prerogative; for even in England, where the doctrine is stated under the head of 'prerogative,' this in effect means nothing more than this exception is made from the statute for the public good."

The first section of the homestead act under which the exemptions in this case are claimed, provides "that in addition to the personal property now exempt from execution on all debts and liabilities created or incurred after the first day of June, 1866, there shall be exempt from sale under execution, attachment or judgment of any court, except to foreclose a mortgage given by the owner of a homestead, or for purchase-money due therefor, so much land, including the dwelling-house and appurtenances owned by the debtor, as shall not exceed in value one thousand dollars." This section, which is the only one in the act relating to the exemption, is general in its application, and is evidently intended to operate in transactions between individuals, and it nowhere refers directly or indirectly to the State. It is insisted, however, by the learned counsel representing the appellees, that the act regulates proceedings under writs of execution, and prescribes that certain property shall not be taken and sold under the same; that no exemption is made in favor of the State; and that if she chooses to resort to this writ, she must take it with all the limitations and restrictions imposed upon it by law when issued upon judgments in favor of individuals. But the act applies as well to property sought to be sold under attachment and judgments of courts as to that taken under execution; and if it applies to the State at all, the exemption is as comprehensive as to an individual, no matter what character of proceeding she may select.

Nor can the act be made to apply to the State by implication; not only because such an application would be contrary to public policy, but because it would divest the State of a right, and repeal by implication an express statute subjecting to the payment of "judgments, in the name of the commonwealth, against sheriffs and other public collectors, their sureties or the heirs, devisees or personal representatives of any of them, * * * the estate, legal and equitable, of all the defendants to said judgments" which may be owned by them at any time from the commencement of the suit till satisfied. Sec. 6, art. 8, ch. 83, Revised Statutes.

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This extraordinary right is peculiar to the State; no other creditor has it. In other personal judgments the lien exists only by virtue of an execution in full force, or of a levy made thereunder; but the lien in favor of the commonwealth attaches to the estate, both legal and equitable, of all the defendants, and binds it from the beginning of the suit till the judgment is satisfied. It binds *all their estate* except such as is exempt from the payment of debts by some provision of the Revised Statutes enacted contemporaneously with the section under consideration. *Harlan v. Lumsden*, 1 Duvall, 88.

Public policy seems to require that this exceptional right shall continue to exist, in order that the public revenues may be speedily and certainly collected. And as we perceive nothing in the "homestead law" necessarily indicating an intention upon the part of the general assembly to divest the commonwealth of a right so important and so long enjoyed, we do not feel that we are warranted in so construing said law as to make it operate as a repeal of a statute to which it does not allude either directly or incidentally, and with which it cannot be said, when properly considered, to conflict. We have been referred to the case of *Doe ex dem. Gladney and another v. Deavors*, 11 Ga. 81, as bearing upon this case and militating against the foregoing conclusions.

That case decides that the exemption laws of Georgia exempting certain personal property from sale for debt applies as well to the State as to individuals, and that such property could not be taken and sold even in payment of the taxes due from the citizen to the State. It is not necessary that we should express an opinion as to the correctness of the reasoning by which that court reached this conclusion. Our statutes of exemption will admit of no such construction. The sheriff may distrain all the goods and chattels of the tax payer; "may retain the amount of taxes, county levies and other public dues against individuals out of any claims allowed by the commonwealth or the county court to such individuals, notwithstanding any assignment of the same." Revised Statutes, ch. 83, art. 11, § 5. He may attach choses in action. Myers' Supplement, 401, 470. And if there be no personal estate that can be reached by the sheriff, the real estate of the defaulting tax payer shall be held responsible, heavy penalties being assessed each year, and the realty itself forfeited to the commonwealth when two years' taxes shall remain unpaid. Revised Statutes, ch. 83, art. 9, § 12.

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There being no exemption under our laws in favor of the citizen, it would be strange if the sheriff, after having wrung from the poor, by the sale of the most indispensable articles of their personal estate, the taxes due from them, could appropriate the moneys thus collected, and he and his official sureties defeat the State in the collection of its judgment against them, on account of such defalcation, by availing themselves of the homestead exemption. Such a construction of the statutes bearing upon these questions would be at war with every principle of common justice, and, in our opinion, would have the effect of defeating the legislative will.

We, therefore, conclude that the circuit court erred in overruling the demurrer to the second paragraph to the appellees' petition; and for that reason we affirm its judgment upon the cross-appeal and reverse it upon the appeal.

The cause is remanded, with instructions to dismiss the petition and dissolve the injunction.

Judgment accordingly.

LOUISVILLE & NASHVILLE R. R. Co., appellant, v. BUCKNER.

(5 Bush, 377.)

War — rights of enemies as to private property.

A citizen or corporation in one country or section of country at war with another, is responsible for the unauthorized appropriation of an enemy's private property, whether the possession be acquired by a mere trespass or through the form of a purchase under an illegal judgment of a court.

APPEAL from a judgment on the report of a commissioner.

During the late civil war the appellee, a citizen of Kentucky, and the owner of valuable property therein, became engaged as a general officer in the military service of the Confederate States, and in that capacity was with their army, commanded by General A. S. Johnston, at Bowling Green, Kentucky, in October, 1861. It appears that about that time, for military purposes offensive or defensive, a bridge on the line of the Louisville & Nashville Railroad, over Green river,

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was, with other property of the appellant, wholly or partially destroyed by the Confederate army; and on the 26th day of December, 1861, the appellant brought this suit in the Louisville chancery court, for the recovery of \$62,362 against the appellee as damages for the destruction of said property, and under a statute then recently enacted sued out an order of attachment, which was levied on the real and personal property of the defendant, as security for the claim.

The cause progressed to a final hearing, and, after an assessment of damages by a jury, the court rendered a judgment *in rem* in favor of the plaintiff for \$55,361.76, and directed a sale of all the attached property for its payment, providing in the judgment that certain comparatively small debts of the defendant, which were supposed to have priority of lien on the property, should be first satisfied out of its proceeds.

Under that judgment the appellee's property was sold on the 12th day of January, 1863, for prices which are shown to have been greatly inadequate; the appellant becoming the purchaser of a house and lot in the city of Louisville for \$11,000, and a large tract of land in Hart county for \$1,000; out of which \$3,411.05 were paid in satisfaction of the claims and costs of preferred attaching creditors, and the residue was withheld as a credit on the judgment for \$55,361.76; and the appellant acquired the possession of the property under its purchase, and by its tenants occupied that in Louisville from January, 1863, to January, 1868, and the land in Hart county from June, 1865, to April, 1868; at which times the possession was restored to the appellee under an agreed judgment rendered in December, 1867, vacating the sales, he having in the mean time entered his appearance and filed an appropriate pleading seeking that relief.

By the last-mentioned judgment the cause was referred to the commissioner of the court to state and report the accounts of the parties, which, as expressed in the order, should "contain and show the debits and credits of each party growing out of payments, money advanced, improvements of the property, and out of the attachment, and out of the sales, and out of all other matters connected with and in these suits."

The commissioner made his report, charging the appellee with the amount of debts paid as preferred claims, as already stated, and \$2,339.86 paid to remove a lien on part of the property, and other payments claimed to have been made by the appellant, and crediting

him with the proceeds of the sales of his personal property and rents of the real estate, and damage done thereto, estimated according to what seems to have been the weight of the evidence, and showing a balance to the appellee of \$5,890.67; for which the court rendered the judgment from which this appeal is prosecuted.

James Speed, for appellant.

R. W. Woolley, for appellee.

HARDIN, J. (After stating facts.) By exceptions which were taken in the court below, as well as the argument for the appellant in this court, it appears that the principal points on which it resisted the allowance of the claims for rents and damage, and now seeks a reversal of the judgment, are in substance:

1. That the appellee having been during much of the time the property was occupied by the appellant, and when the alleged damage was committed, engaged in the war against the government of the United States, to which this State adhered, there could be no lawful contract on the part of the appellant to pay for the use of his property or damage thereto, nor would the law imply an obligation to do so.

2. That, if any liability existed for rents, the amount actually received by the appellant was the correct criterion, and not the value of the use of the property, as assumed by the commissioner.

It would certainly manifest a singular want of reciprocity of obligation between the parties, as they respectively stood toward each other as belligerent enemies, to admit the principle stated in the first proposition, with such an application as to exclude the appellee's claim, which arose before the close of the war, and still leave him chargeable with the amount of his debts, which the appellant, unsolicited by him, and perhaps without his knowledge, paid to his creditors, while all business intercourse between them was interdicted by the laws of war. And yet if that principle be conceded as equally applicable to both parties, and made to exclude the claims of both which arose while the appellee was in the position of a public enemy, his claim for the rent of his property alone accruing afterward would, according to the evidence, exceed the amount of the judgment which was rendered in his favor.

But it cannot be admitted that in such a civil war as the recent

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conflict in this country was, which for years divided the republic itself into two organized communities of States, both the contending parties were not entitled to all the rights of war as against each other. Lawrence's *Wheaton on International Law*, 520.

But there is no maintainable ground, as we conceive, for the proposition that a citizen or corporation in one country or section of country at war with another can avoid responsibility for the unauthorized appropriation of an enemy's private property, whether the possession be acquired by a mere trespass or, as in this case, through the form of a purchase under an illegal judgment of a court.

Although, as a general rule, the existence of a state of war suspends alike commercial intercourse and civil rights and remedies as between antagonist enemies, it does not destroy but only suspends their relative rights; and when the war ceases the one is remitted to his remedies against the other as if no suspension had occurred, and may maintain his action for the recovery of property or wrongs committed thereon, or for the use and occupation thereof. *Hord and wife v. Alexander*, MS. decision, April, 1867; *Crutcher v. Hord and wife*, 4 Bush, 360; *Bradwell v. Weeks*, 1 Johns. Ch. 206.

We concur in the conclusion of the court below; also that the right of the appellee to recover for the use of the property was not limited by the annual rents which the appellant may have received, but that he was entitled to recover what the use of the property was reasonably worth.

Wherefore the judgment is affirmed.

SHANNAHAN, appellant, v. COMMONWEALTH.

(8 Bush, 463.)

Criminal law—drunkenness not an excuse for crime or a mitigation of punishment.

The voluntary drunkenness of a murderer neither excuses the crime nor mitigates the punishment. The rule is, that one in a state of voluntary intoxication is subject to the same rule of conduct, and to the same rules and principles of law, that a sober man is; and that where a provocation is offered, and the one offering it is killed, if it mitigates the offense of the man drunk, it should also mitigate the offense of the man sober.

APPEAL from a sentence and conviction under an indictment for murder. The opinion states the case.

A. H. Field, for appellant.

John Rodman, attorney-general, for appellee.

PRYOR, C. J. The appellant, Matthew Shannahan, was indicted in the Jefferson circuit court for the murder of C. W. Montgomery, and under the indictment was tried by a jury and found guilty as charged, and by the judgment of that court condemned to be hung, and from that judgment he prosecutes this appeal.

It will be necessary to recite, in substance, the facts proven upon the trial in order to determine the propriety of the refusal by the court below to give certain instructions asked for by counsel for the appellant, and the giving of instructions in lieu thereof.

It appears from the evidence that the appellant, on the 22d of August, in the year 1870, about twelve or one o'clock of that day, announced his intention of going to see Montgomery (the deceased) for the purpose of getting his (appellant's) stone-hammer, saying "that Montgomery had taken it away." The appellant had been informed that the deceased was working for a man by the name of Shanks. He went to the grocery of Shanks and inquired for Montgomery, and was told that he was in the woods at work some half mile distant from the house. While at Shank's he took a dram, purchased a quart of whisky, and started in the direction of the woods where Montgomery was at labor, and upon his arrival there found Montgomery and a man by the name of Applegate at work. The appellant and the deceased, as the witness Applegate states, met each other in a friendly manner, and engaged in conversation relative to deceased having previously worked for him, and appellant offered to employ him again. The three drank the quart of whisky, and late in the evening returned to Shank's grocery, where they took another drink and had the quart-bottle refilled. Applegate left them late, and says that when he left they were still friendly and drinking. The appellant and deceased left Shank's house after night, and went in company to Brown's residence, where deceased was boarding, and reached there about half-past eight o'clock at night. From Shanks' house to Brown's is a distance of about five hundred yards. Upon their arrival at Brown's he refused to permit

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the appellant to remain all night; but upon the suggestion of the deceased, that if he persisted in refusing he would sleep with appellant in the stable, Brown consented that the appellant might remain all night. The two then entered the family-room of Brown, placed the quart-bottle of whisky on the mantel, with about one-third of its contents gone, and conversed with Brown fifteen or twenty minutes. They then left by a stairway for their bedroom upstairs, and when they reached the floor above Brown says he heard a scuffle and fall, and Montgomery cried out, "*You have killed me.*" He hurried to the room and met the appellant coming down the stairway with a knife in his hand, and witness ordered him not to leave. He made his escape through the back door leading to the rear of witness' premises, and was in a few days afterward arrested. The witnesses found Montgomery badly cut upon the arms, legs, and other parts of the body, and his entrails protruding. He lived but a short time; stated that Shannahan had killed him without cause. The deceased had no weapons upon his person, and so far as the circumstances indicate offered no resistance. The evidence establishes the fact that the appellant, when sober, is a quiet, peaceable, and industrious man, but when drunk is boisterous, unruly, and always when in that condition ready to attack friend or foe. There is no doubt from the proof but that both the appellant and the deceased were under the influence of liquor at the time of the killing.

The appellant's counsel relies in his argument upon five different grounds for the reversal of this case :

1. Because the verdict is against the evidence.
2. An improper effort upon the part of the attorney for the commonwealth to convict the accused.
3. That the special judge had no power to pronounce the judgment upon the verdict.
4. That the court misinstructed the jury.
5. That the court refused properly to instruct the jury.

This court has no power to revise a judgment of conviction for either the first, second or third grounds relied upon by counsel, and the only question presented by the record is, did the court err in refusing the instructions asked for by appellant's counsel, and in giving other instructions in lieu thereof? Counsel insists that the instructions given in this case are *multitudinous, misleading and inapplicable*. While instructions given to a jury upon such an issue

as is here presented should be as plain and concise as possible, and no more in number than the case requires, still the defendant's counsel asked twenty-two instructions, and the court, in lieu of and in explanation of these instructions, gave about one-half the number, the most of which contain the law of the case, and were certainly not prejudicial to the appellant.

The effort upon the part of the defense, from the legal propositions submitted to the jury, was to reduce the offense from murder to manslaughter by reason of appellant's intoxicated condition at the time of the killing. The propriety of the instructions on this branch of the case will alone be considered, as all the other instructions given by the court are substantially correct.

Instruction No. 9 given by the court in behalf of the appellant is as follows: "That if, at the time of the alleged commission of the crime charged in the indictment, the accused was, from sensual gratification and social hilarity, and not with the design of committing a crime, under the influence of whisky to such an extent as to seriously interfere with or deprive him of reason, they should find him not guilty of murder; but, if guilty at all, of voluntary manslaughter, unless they believe from the evidence he drank with the intention of committing the deed with which he is charged. In which case he would be guilty of murder."

Instruction No. 10 is as follows: "If, at the time of the killing, the defendant was intoxicated from the use of whisky, and said intoxication was not feigned or simulated, nor contracted with the intention of committing the deed, and the killing was prompted by the intoxication alone, and except for it could not have occurred, you should find him not guilty of murder; but, if guilty at all, of voluntary manslaughter."

The counsel for appellant insists that the following instruction should have been given without containing any of the qualifications embraced in instructions Nos. 9 and 10, viz.: "*That if, at the time of the killing, the defendant was intoxicated from the use of whisky, and the killing was prompted by it alone, and except for it would not have occurred, you should find the accused not guilty of murder; but, if guilty at all, of voluntary manslaughter.*"

In the opinion of this court, if drunkenness can be pleaded in excuse for crime, or by way of mitigating the punishment on account of crime, we perceive no valid reason for withholding from

the consideration of the jury such an instruction as asked for by the counsel for the appellant in a case like this.

It was a settled rule of the common law that voluntary drunkenness excused no man from the commission of crime; and, instead of palliating the offense, it was held as an aggravation of the wrong committed. Some of the more recent American authorities upon this subject have greatly relaxed this rule, and gone so far as to establish as law the reverse of the proposition, viz.: "That voluntary drunkenness, instead of aggravating the offense, is such a mitigating fact as to lessen the punishment;" and, upon an indictment for murder, in the absence of any proof showing that intoxication was resorted to in order to enable the party charged to take human life, the fact of *drunkenness itself* is held sufficient to reduce the crime from murder to manslaughter. By the statute law of Kentucky, drunkenness is made an offense for which a penalty may be imposed; and, although drunkenness is in violation of good morals as well as the law of the land, it may be proper, out of charity to the passions of men and their inability to control in many instances either their passions or appetites, not to adhere to the rigorous rule of the common law, and add to the punishment of a party who, by committing a penal offense, places himself in such a condition as causes him to commit a still greater offense. But, while we sanction this modification of the common-law doctrine, we are well satisfied that neither the interests of society nor the wisdom and justice of law requires or authorizes the judicial tribunals of the country to establish the legal principle that the violation of one law, resulting in inflaming and exciting the worst passions of men, shall be deemed a sufficient cause for mitigating the punishment to be inflicted upon those who commit great crimes. "*The law of England, considering how easy it is to counterfeit that excuse (drunkenness), and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another.*" 2 Blackstone's Commentaries, 25. It is true that some of the recent adjudged cases qualify the principle involved by stating "*that if intoxication is resorted to for the purpose of stimulating one to the commission of a meditated felony, then there can be no mitigation of the punishment;*" but it seems to us that no man, unless he is so wanting in intellect as to make him irresponsible for his acts, would be so reckless of his own security as to announce his intention of

becoming intoxicated so as to enable him to take human life or inflict punishment upon his enemy.

But, on the contrary, men of violent passions and wicked designs would avail themselves of this very principle of law, by becoming drunk in order to take the lives of their fellow-men, with the consciousness on the part of the offender that his drunkenness would be the mitigating feature of his case. The recognition of such a rule of law is but an invitation to men of reckless habits to commit crime; and while their punishment is by incarceration only in the State prison for a few years, the sober man, whose cause for revenge and the desire to take human life therefor is kept within his own breast, for the commission of a like offense is made to suffer death. There is no reason or philosophy that would hang the sober man for murder, and lessen the punishment of the man intoxicated for the same offense, because the latter had voluntarily placed himself in a condition by which he is induced to take human life.

In the present case the jury were not only told by instructions Nos 9 and 10 that drunkenness mitigated the offense by the reducing it from murder to manslaughter, but they were told by the fourteenth instruction, based upon the fact of drunkenness alone, that "if they believed appellant was insane at the time of the killing they must acquit." These instructions were all more favorable to the appellant than the law or facts of the case authorized.

If one is insane, and while in that condition commits an offense, he is not responsible, for the reason that he is not enabled to know right from wrong, and, if he kills, does not know that to take human life is wrong; or, as has been held in cases of moral insanity, where from the existence of some of the natural propensities in such violence it is impossible not to yield to them; but voluntary drunkenness, that merely excites the passions and stimulates men to the commission of crime, in a case of homicide by one in such a condition, without any provocation, neither excuses the offense nor mitigates the punishment.

We are not to be understood, however, as determining that the fact of drunkenness in a case like this is incompetent testimony before a jury upon the question of malice. Malice, express or implied, must be proven in order to constitute the crime of murder, and in the absence of this proof no conviction can be had for such an offense; and evidence as to the condition of the accused at the time of the killing, whether drunk or sober, should be permitted to

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go to the jury, in connection with other facts, in determining the question of malice. What we do adjudge is, that in the trial of a case like this, the fact of drunkenness, while it may be a circumstance showing the absence of malice, should not be singled out from the other proof, and the jury told that it mitigates the offense. The proper rule is, that one in a state of voluntary intoxication is subject to the same rule of conduct, and to the same rules and principles of law, that a sober man is; and that where a provocation is offered, and the one offering it is killed, if it mitigates the offense of the man drunk, it should also mitigate the offense of the man sober.

We feel that public policy, the demands of society, and, more than all, the wisdom and justice of the law require that the principles herein established should be adhered to; and as a different construction is placed by many upon the law as declared by this court in the cases of *Smith v. The Commonwealth*, 1 Duvall, 224, and *Blimm v. The Commonwealth*, 7 Bush, 320, involving similar questions, those cases are overruled so far as they conflict with the principles of this opinion.

The judgment of the court below is affirmed.

AMERICAN CONTRACT COMPANY, appellant, v. CROSS.

(8 Bush, 472.)

Common carrier — what constitutes baggage.

A gold watch deposited in a trunk by a traveler on a railroad is baggage, for the loss of which the carrier is liable. (*See note, ante, p. 302.*)

APPEAL from a judgment against a common carrier.

The appellant, being a common carrier, running its cars with freight and passengers on what is known as the Evansville, Henderson & Nashville Railroad, undertook, for the customary price, to carry the appellee, with her baggage, from the town of Pembroke, on the line of the road, to the town of Hopkinsville, Ky. The baggage consisted of a trunk containing articles of clothing, and a gold watch. This trunk was not delivered to the appellee when she left the train

at Hopkinsville, and seems not to have been received by her until some days afterward. When she obtained the trunk her watch, of the value of near two hundred dollars, was missing, and an indifferent watch, worth about twenty-five dollars, substituted in its place. This suit is brought against the appellant, as a common carrier, to recover the value of the watch, etc.

The proof on the part of the appellee shows that when the trunk was placed upon the cars it was securely locked and strapped down; that when the appellee reached her place of destination Monday, she sent on Tuesday morning to the depot for her trunk, and the messenger was informed by the conductor that the trunk was claimed by some gentleman, and was carried back to Pembroke, the station where appellee had taken passage. The testimony of Mrs. Cross shows that the watch was in her trunk when she left the residence of her relative for the cars, which was only a short distance. In this she is corroborated by two other witnesses, one of them who delivered the trunk at the train, securely locked and in good condition. That she had and owned a gold watch of the description alleged is clearly proven, and that when she opened the trunk upon receiving it, some day or two afterward, she found an inferior watch, worth about twenty-five dollars, is equally as well established.

The defense proves by the conductor that when the train arrived at Hopkinsville the appellee told him to have her trunk placed in the freight depot, and that he directed the baggage-master to place it there; that when the messenger from Mrs. Cross came after the trunk on Tuesday morning, he told him the trunk was taken back to Pembroke by a man who claimed it; that he found the trunk at a place called Guthrie, broken open, and is satisfied that he was mistaken when he said "that he had taken it back to Pembroke." The baggage-master swears that when he first received the trunk it was partly open, and that when he reached Hopkinsville he delivered it to some expressman, whom he does not know, at the request of Mrs. Cross; that on Tuesday morning, in going into the baggage car, he saw the trunk; and by whom it was brought back he cannot tell.

This is in substance the evidence in the case. The law and facts were submitted to the court, and a judgment rendered for the value of the watch.

The company appealed.

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Felund & Evans, for appellant.

Petree & Faulkner, for appellee.

PRYOR, C. J. (After stating facts.) We are of the opinion, from the evidence in the case, that the trunk of the appellee was never taken from the baggage car, and was taken back to Guthrie or Pembroke the next morning. If a gold watch deposited by the traveler in his trunk is to be regarded as baggage, the appellants are certainly liable. There is some conflict of authority on this point, but the weight of authority results in holding common carriers liable in such cases. Redfield on Carriers, page 70, says that a watch carried in one's trunk is proper baggage. In the case of *Doyle v. Kiser*, 6 Porter (Ind.), 242, Justice PERKINS enumerates as baggage "clothing, traveling expense money, a watch, ladies' jewelry," etc. A gold watch and spectacles were held to be such in the case of the steamer *H. M. Wright* (Newberry's Admiralty, 494). In the case of *The Orange Co. Bank v. Brown*, 9 Wend. 85, Justice NELSON held that "money taken for mere transportation is not regarded as baggage; but that money taken to defray the expenses of travel is to be regarded as baggage." What constitutes baggage, as the word is used in the law-books, is not very well defined; but it seems to us the meaning given to the word by Justice WOOD, in the case of *Jones v. Voorhees*, 10 Ohio, 151, is as easily understood as any to be found in the books, viz.: That whatever forms the necessary appendages of the traveler may be regarded as baggage, and placed in a trunk for conveyance; and, as stated by the learned judge in that case, the watch may be placed in the trunk to avoid accident on the travel, or as a matter of convenience and even safety. It is not such negligence on the part of the owner as releases the carrier from liability. Indeed, the watch might be regarded as safer in the trunk than upon the person, when the traveler on his journey is compelled to mingle with and pass through large crowds of persons generally assembled about railroad depots.

In this case the watch was lost by the negligence of the appellants, and to relieve them from liability would be determining that the passenger must care for his baggage, and not the carrier.

(The judge here disposed of an unimportant question of evidence.)

The judgment of the court below is affirmed.

BOHANNON, appellant, v. COMMONWEALTH.

(8 Bush, 481.)

Criminal law — homicide in self-defense.

On an indictment for murder, where the plea of self-defense was relied upon, the jury were instructed that "by the term malice aforethought, is meant a predetermination to kill, however suddenly or recently formed in the mind of the person killing, before the fatal act, so that the determination actually exists in the mind before and at the time of the killing, and be not prompted alone by the first transport of passion and under great provocation." *Held*, error, on the ground that the instructions under the plea of self-defense was in effect a determination by the court that killing in necessary self-defense may be killing with malice aforethought, and, therefore, legally murder. A killing, to constitute murder, must be done unlawfully, and unless it be unlawful, it cannot have been done with malice aforethought, although it may have been predetermined.

Where one's life has been repeatedly threatened by an enemy, a desperate and lawless man, an actual attempt been made to assassinate him, and the members of his family been informed by such enemy that he is to be killed on sight, he may lawfully arm himself to resist the threatened attack; he may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose, and if, on such occasion, he casually meets his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man, and the circumstances attending the meeting, he has reason to believe that the presence of his enemy puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed.

APPEAL from judgment and sentence under an indictment for murder. The opinion states the case.

P. U. Major, — *Robinson* and *J. P. Force*, for appellant.

John Rodman, attorney-general, for appellee.

LINDSAY J. At the September term, 1871, of the Shelby circuit court, Hiram Bohannon was indicted, tried and convicted for the murder of Addison Cook. His motion for a new trial was overruled, and from the judgment of that court, sentencing him to be hung, he prosecutes this appeal.

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The deceased is shown by the evidence to have been a man of lawless habits, overbearing, revengeful and vindictive, and resolute and determined in the execution of his plans of vengeance against those who incurred his hostility. The testimony also conduces to show that he was at the head of a secret organization which habitually set the laws of the commonwealth at open defiance, and the members of which, under the pretense of inflicting punishment upon criminals who could not be reached by the process of the law, were themselves guilty of the commission of both penal and criminal offenses.

Several months before his death, for reasons not fully explained, Cook became the avowed enemy of the appellant. He more than once openly threatened to take his life. Of these threats Bohannon was informed. On the Saturday before the killing, which took place on Tuesday, the 15th day of August, 1871, Cook, in company with one Penn, and evidently in the execution of a preconcerted plan, with a drawn pistol attacked Bohannon upon the public highway, and the latter only succeeded in escaping assassination by deserting his horse, and concealing himself in the fields adjacent to the road. The assailants then pursued the witness Blakely and his wife, who were in company with Bohannon, and who resided at his house; and when they had overtaken them Cook compelled Mrs. Blakely to retract certain statements she had made relative to his being the chief of a lawless organization known as Ku-klux, threatening her with immediate death in case she refused to make the required retraction. He then announced to Mrs. Blakely and her husband that he intended to kill Bohannon on sight.

This threat they communicated to Bohannon that night. They also gave him a detailed statement of Cook's conduct at the time it was made.

On the morning of the killing, and but a short time before it took place, Cook asked a witness named Hamilton whether he could not frame some excuse for going to Bohannon's house, and ascertaining his whereabouts, stating that he was anxious to ascertain that fact.

On that morning Bohannon left his house, so far as the evidence shows, for the first time after he was attacked on the Saturday before. He took with him a double-barreled shot-gun. The deceased and the appellant met in the railroad cut near the village of Bagdad. Two shots were heard in quick succession. No one saw the rencontre. Cook was found a few minutes afterward lying dead

on the side of the railroad track, with a revolving pistol in his pocket, about half way out. The shot had taken effect in the back of his head and neck, and in his body between the shoulders. Bohannon was seen coming from the spot where the shooting was done, and in reply to a question said that "he had shot a thief, who had run him out of the road a few days before, but that he would not run anybody else out of the road again."

Upon these facts the court gave the jury a series of carefully prepared instructions, eleven in number, and refused all that were asked by Bohannon. It is complained that several of the instructions given are erroneous, and that taken together, they were misleading and prejudicial to the substantial rights of the appellant.

By the first instruction the jury were told that, "by the term 'malice aforethought' is meant a predetermination to kill, however suddenly or recently formed in the mind of the person killing before the fatal act, so that the determination actually exists in the mind before and at the time of the killing, and be not prompted alone by the first transport of passion and under great provocation." If the plea of self-defense had not been relied on, and the sole effort of the appellant had been to reduce the killing from murder to manslaughter, this definition might not have been calculated to prejudice his rights; but standing as it does without any subsequent modification or explanation, it is in effect a determination by the court that killing in necessary self-defense of one's person or property may be killing with malice aforethought, and therefore legally murder. A killing, to constitute murder, must be done unlawfully, and unless it be unlawful it cannot have been done with malice aforethought, although it may have been predetermined.

A party upon whom a murderous assault is made, when there are no other apparent means of escape, may determine to defend himself without attempting to flee, and, if necessary, to kill his assailant; and if, pursuant to this predetermination suddenly formed, he does kill, it will be neither a malicious nor unlawful but an excusable homicide. 3 Greenleaf's Evidence, § 550; 1 East's P. C. 271.

By the seventh instruction the jury were told that "the right of self-defense is founded on necessity, and cannot be exercised in any case or to any degree not necessary. No instrument or power beyond what is necessary is to be used; and when one expects to be attacked his right to defend himself does not arise until he has done every thing in his power to avoid the necessity. Human life cannot be

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taken by way of personal defense only in extreme or apparently extreme necessity. But when the attack is made with felonious intent against the person the party attacked is not bound to flee. . . . When a known felony is manifestly about to be committed upon the person of a man by violence or surprise he is not bound to flee; but may even pursue his adversary until he is out of danger, but no further, and if death result in the conflict he will be guiltless. . . . So if it was manifest that *decident* was about to commit one of these felonies (murder, manslaughter, or malicious wounding) by violence or surprise upon the person of defendant, and he shot *decident* solely to prevent the commission of such felony, he shot justifiably, and was not bound to attempt to escape by retreat or otherwise."

The eleventh instruction is in these words: "You cannot acquit the defendant on account of mere threats made by *decident* against the defendant, unless you believe from the evidence that at the time he fired the fatal shot, if he did fire it, the *decident* was making some demonstration from which the defendant had reasonable grounds to believe that the *decident* was then about to put his threats into execution by killing defendant, or inflicting upon him some great bodily harm."

It was misleading to instruct the jury, under the proof in this prosecution, that Bohannon's right of self-defense did not arise until he had "*done every thing in his power to avoid the necessity*" of slaying his adversary. He might have avoided such necessity by secreting himself so that he could not be found, or by abandoning his home and seeking safety in some remote part of the country; but under the law he was not required to resort to either of these methods of securing his personal safety.

Instruction No. 11 will be considered in conjunction with others given by the court after the submission of the case to the jury.

After considering the case for some considerable time, at their own request they were conducted into court by the sheriff, and inquired of the court: "Whether to exonerate the defendant from guilt on account of the killing they must confine themselves to the time of killing, and disregard all danger that formerly existed, all danger in the future, and all previous threats?"

The court instructed, in answer to this question:

1. "That they cannot acquit the defendant on account of any danger, real or apparent, not existing, or not on reasonable grounds

believed by the defendant to exist, *and to be about then to fall upon him at the time of killing.*"

2. "They should not disregard previous threats, but should regard and weigh them so far as they may shed light on the question as to the real or apparent danger defendant was in at the time he did the killing, if he did it; and also as to whether he did the killing with malice aforethought or without malice."

3. "The jury, asking whether they are to regard only the circumstances occurring immediately at the killing, and to disregard all other testimony in the case, are instructed that they are to regard and weigh all the testimony in the case."

The first of these three instructions is in direct conflict with the law of self-defense, as laid down by this court in the case of *Phillips v. Commonwealth*, 2 Duvall, 328, and also in the case of *Young v. Commonwealth*, 6 Bush, 312.

The first of these cases has been the subject of much criticism, not so much on account of the conclusions of the court on the point actually decided as of the argument of the writer in support of these conclusions. This argument is merely dictum, not entitled to be regarded as authority, and valuable only to the extent it accords with the reason of the law of self-defense.

We adhere to the ruling of the court in that case in so far as it was decided that the principle of self-defense does not equally apply in cases of mutual rencounters or affrays with deadly weapons, and one like this, where the life of the accused has been threatened by a lawless, determined and vindictive enemy, when he has actually been assaulted with deadly weapons and compelled to fly for safety, and when, after he has thus escaped, this enemy announces to the members of his own family the intention to take his life whenever and wherever he may find him.

This distinction is recognized by all the standard writers upon the English criminal law. It is thus stated by East (1 P. C. 271, 272): "A man may repel force by force in defense of his person, habitation or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony, such as rape, robbery, arson, burglary or the like. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and, if he killed him in so doing, it is justifiable self-defense; as, on the other hand, the killing by such felons will be murder. But a bare fear of any of these offenses,

however well grounded, as that another lies in wait to take away the party's life, unaccompanied by any overt act indicative of such an intention, will not warrant him in killing that other, there being no actual danger at the time."

The doctrine of this author seems to be that fear, though grounded upon the fact that one lies in wait to take a party's life, or upon the murderous threats of a desperate and determined enemy, will not, in the absence of actual danger at the time, justify the party so endangered or threatened in slaying his adversary. But that when this lying in wait or these threats have been accompanied by an actual attempt to kill, and from all the attending circumstances the party in danger believes, and has the right to believe, that he can escape the constantly impending danger, which becomes imminent whenever his foe is present, in no other way except to kill such foe, he is not obliged, when he may casually meet him, to fly for safety, nor to await his attack.

However this may be, the threats of even a desperate and lawless man do not and ought not to authorize the person threatened to take his life; nor does any demonstration of hostility, short of a manifest attempt to commit a felony, justify a measure so extreme. But when one's life has been repeatedly threatened by such an enemy; when an actual attempt has been made to assassinate him, and when, after all this, members of his family have been informed by his assailant that he is to be killed on sight, we hold that he may lawfully arm himself to resist the threatened attack. He may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose; and if, on such an occasion, he casually meets his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man and the circumstances attending the meeting he has the right to believe, that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed. He may not hunt his enemy and shoot him down like a wild beast; nor has he the right to bring about an unnecessary meeting in order to have a pretext to slay him; but neither reason nor the law demands that he shall give up his business and abandon society to avoid such meeting. The instructions under considera-

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tion are inconsistent with this view of the law, and are, therefore, deemed erroneous.

It is complained that incompetent and illegal testimony was permitted to go to the jury, but as the alleged error will not likely occur on the next trial of the appellant, it is not necessary that we should pass upon it. So far as any portions in the opinion in Phillips' case are inconsistent with this opinion, the same are overruled. In the *Carico Case*, 7 Bush, 124, the judgment of the circuit court was reversed upon a question growing out of the refusal of said court to admit certain legal testimony. Judge HARDIN, while expressing his inclination to overrule the Phillips case to some extent, recognized it as authority until overruled by this court, but did not fully concur in the opinion of Judge ROBERTSON as to the law of the Carico case; and Judge PETERS declined to express any opinion upon that branch of the case discussed by Judge ROBERTSON, believing that the facts did not bring it within the principle decided in the Phillips case.

For these reasons it is manifest that the opinion of Judge ROBERTSON, so far as it relates to the principle of self-defense, is but an expression of his individual views, and not binding upon this court.

For the errors pointed out in this opinion, the judgment appealed from is reversed, and the cause remanded for a new trial upon principles consistent herewith.

Reversed and remanded.

BROADWAY BAPTIST CHURCH, appellants, v. McATEE *et al.*

(8 Bush, 508.)

Assessment for local improvements.

By the charter of the city of Louisville, the public ways of the city were placed under the exclusive control of the general council, with power to improve them by original construction and reconstruction. The charter further provided that the improvements "shall be done as may be prescribed by ordinance, at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the general council, . . . payment

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to be enforced as other taxes, or by proceedings in court." *Held*, constitutional.

Under such a charter, church property is liable to be assessed for improvements though exempted by general laws from taxation. (*See note, p. 487.*)

APPEAL from a decree of the chancellor. The opinion states the case.

Andy Barnett, J. W. Edwards, J. Harding, R. J. Elliott, for appellants.

Muir & Bijur, for appellees.

T. L. Burnett, for city of Louisville.

LINDSAY J. This court adheres to the opinion delivered in the case of *Bradley v. McAtee, etc.*, 7 Bush, 667 (3 Am. R. 309); it is, therefore, unnecessary to discuss the constitutionality of the tax assessed against these appellants to pay portions of the cost incurred in the reconstruction of Broadway street with Nicolson pavement, in so far as it is claimed that the imposition of such tax impairs the obligations of contracts.

The twelfth section of the charter of 1870 places the public ways of the city of Louisville under the exclusive control of the general council, with power to improve them by original construction and reconstruction. It provides that such improvements "shall be done as may be prescribed by ordinance, at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the general council according to the number of square feet owned by them respectively, except that corner lots (say thirty feet front, and extending back as may be prescribed by ordinance) shall pay twenty-five per cent more than others for said improvements. A lien shall exist for the cost of improvements of public ways, for the apportionments and interest thereon, against the respective lots; and payments may be enforced as other city assessments for taxes upon the property bound therefor, or by proceedings in court; and no error in the proceedings of the general council shall exempt from payment, after the work has been done as required by ordinance or contract, but the general council, or the courts in which suits may be pending, shall make all corrections, rules and orders to do justice to all parties concerned; and in no event shall the city be liable for

such improvements without having the right to enforce it against the property receiving the benefit thereof," etc.

It is certainly well settled in this State that the cost of the original construction of the streets of a city may be imposed upon the owners of real estate alone, without violating the constitutional limitations upon the legislative power of taxation. We can perceive no sufficient reason why the cost of the reconstruction of such streets may not also be assessed against the owners of the same character of property. In proportion as the trade and population of a city increase, the value of real estate advances. The owners of such estate receive and enjoy very nearly the sole permanent advantages accruing to the city from the construction, repairs and reconstruction of the streets upon which their property may be situated. The general public certainly receives incidental benefits from such improvements; but the benefits to the owners of real property are direct, appreciable and permanent. The original improvement enhances the value of lots adjacent to the street improved, by making it accessible to the public and attracting trade and population. This enhanced value can be preserved in no other way than by keeping the street in repair, and by its reconstruction when too much worn to be longer repaired. Hence, so far as the right to impose this local taxation depends upon the enjoyment by the persons taxed of peculiar local benefits arising therefrom, it seems to us that there is no substantial difference between the reconstruction and the original improvement of the street.

We are not aware that this question has been directly presented to this court for adjudication in any other case than this; but it has been incidentally involved in several cases heretofore decided, and in no instance has it been intimated that the principle authorizing the tax for the one purpose does not apply equally to the other.

In the case of *City of Covington v. Boyie, etc.*, 6 Bush, 204, the assessments against the lot owners were for the cost of repairing and reconstructing certain streets in that city, and such assessments were held valid, and adjudged to be enforceable. The reasoning of the supreme court of Pennsylvania in the recent case of *Hamett v. Philadelphia*, 85 Penn. St. 146 (3 Am. R. 615), is to some extent antagonistic to this conclusion. But in that case the improvement was not made to bring or keep the street, as all other streets in the built-up portion of the city were kept, for the advantage and comfort of those who lived upon it, and for ordinary business and travel;

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but to make a great public drive, a pleasure ground, "along which elegant equipages may disport of an afternoon." Under such circumstances, to have compelled a small number of persons owning property in the vicinity of such public pleasure ground to pay the entire cost of its construction, would have been manifestly and palpably a spoliation under the forms of law, and that this fact exercised a controlling influence with the court, can be readily gathered from the opinion.

It may be conceded, as was held by that court, that when a street has been improved and assimilated with the rest of the city, and made a part of it, that it is the duty of the municipality, for the general good, to keep it in repair, and when necessary to reconstruct it. But still the important question remains to be determined, how the expense incurred in the performance of this duty is to be paid? Shall a portion of the general revenues of the city be applied to the payment of such expense, or may the sovereign power impose the burden upon that character of property which will be directly and permanently benefited by the expenditure?

In the imposition of this or of all other taxation a broad field is of necessity left open for legislative discretion. Public policy may, and in some cases does, demand that certain kinds of property shall be exempted from all taxation.

The law-making power has always exercised the right, without question, of determining the proper subjects either of general or local taxation, and we conceive that it is not within the province of the courts to abridge this legislative prerogative, nor to refuse to lend their assistance in carrying out the legislative will on account of doubts as to the policy or justice of enactments through which it may be expressed. When the subjects of taxation have been determined, then the constitutional limitation requiring equality and uniformity in its imposition upon such subjects applies, and the courts are bound to see that this limitation is not disregarded.

It is objected that the rule prescribed by the charter of the city for subdividing its territory into subordinate communities for the purposes of street taxation is uncertain and indefinite, and that it cannot be so applied as to secure even approximately that equality and uniformity contemplated by the organic law. The streets are to be improved "at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the general council according to the number of square feet owned by them respectively,

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except that corner-lots . . . shall pay twenty-five per cent more for said improvements."

An examination of a map of the city on file with the record shows that the principal streets do not generally divide the city into exact squares. In most instances such subdivisions have sides of unequal length, and in some cases the streets do not run at right-angles the one with the other, and therefore occasionally portions of territory bounded on all sides by principal streets have but three sides.

It is not to be assumed that the legislature intended that the term "square" as used in the twelfth section of the charter should be held to mean a figure with four sides of equal length, and confined in its application to subdivisions of the city coming within that restricted definition; but rather that each subdivision of territory bounded on all sides by principal streets should be deemed a square, and that the real property constituting each one-fourth of such subdivision should be subjected to the cost of constructing and reconstructing the streets and alleys binding thereon. The general council in apportioning the cost of the improvement of Broadway street between First street and Brook street so construed the act, and made the apportionment in accordance with this theory. It is not to be concealed that difficulties will attend the application of this rule to many portions of the city, and we apprehend that its application will not result in securing exact equality and uniformity of street taxation; but still we are not prepared to decide that the delegated powers are outside of the "well-defined limits within which the practical equality of the constitution may be preserved."

It may well be doubted whether the general council did not err in failing to give the property owners an opportunity of having the improvement made by private contract. But the ordinance under which the work was done was a matter of public record, and every citizen or property holder to be affected had constructive notice of its adoption, and from the time the contractor commenced work it may be assumed that the appellants had actual notice not only of the ordinance, but of the contract under which the work was being done. It does not appear that either of them labored under any legal disability. If it was their intention to rely upon this alleged error as a defense to the claims the contractor would have against them for the assessments provided for by the ordinance to pay the cost of the improvement, it was their duty to have notified them of

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such intention. Under the circumstances presented it is peculiarly proper that the provision of the charter, to the effect that "no error in the proceedings of the general council shall exempt from payment after the work is done as required by ordinance or contract," should be applied to them. By failing to speak when it was their duty to do so they must be held to have waived the right, intended to be secured to them by the charter, of making the improvements for the cost of which they were bound, by private contract.

We are of opinion that ordinances providing for the construction or reconstruction of public ways at the cost of property-owners are not embraced by the provisions of the sixty-seventh section of the charter. But if they were, the error in failing to vote upon the ordinance under which this improvement was made, on two different days, is one which comes within the curative provision of section 12, just referred to. Ordinances providing for the improvements of streets, under the peculiar provisions of the charter of Louisville, are not void merely because the general council fails to follow strictly its delegated powers. Under the general rule of construction, the authority delegated to municipal corporations is to be strictly construed, and must be closely pursued. Sedgwick on Stat. and Con. law, 466; *Kniper v. City of Louisville*, 7 Bush, 599. But the sovereign power that delegates this authority may, when it sees proper, change or abrogate this rule of construction.

So far as the improvement of public ways in Louisville and the assessment of taxation to pay the cost thereof are concerned, this rule is abrogated, and a different one prescribed by the provision in question. The general council is invested with legislative discretion in determining when and in what manner a particular street shall be improved, but in apportioning the cost of the improvement among those persons bound to pay such cost, as well as in accepting the contract under which it is to be made, its action is ministerial, and made subject to judicial revision when tainted with fraud, or when it is necessary for the correction of errors.

The council procures the improvement to be made, and the legislative enactment, to which the municipality owes its existence, unaided by any municipal ordinance, imposes upon the property-owners the duty of paying their proper proportions of the expenses thereby incurred.

The ordinance of July 14, 1869, would have been a valid and perfect ordinance if no mention had been made of the fact that the cost

of the improvement was to be paid by the property-owners. They are subjected to this burden by the city charter, and not because of what the general council saw proper to ordain. Street improvements, under the charter, must be made "at the exclusive cost of the owners of lots in each fourth of a square;" "and in no event shall the city be liable for such improvements without having the right to enforce it against the property receiving the benefit thereof."

The contract under which the work was done substantially conforms to the ordinance. The intersection is paid for by the city, and we are not satisfied that in making the contract by the square the intersections could have been properly excluded.

The evidence presented does not show that the general council abused its discretion in procuring the improvement to be made, nor that the contractors did not in good faith keep and perform the conditions and stipulations of their undertaking. Upon this last question there is some contrariety of evidence, but the preponderance of the testimony is certainly in favor of the conclusion reached by the chancellor.

The ordinance did not vest the city engineer with legislative powers, but only with a reasonable and proper discretion.

The prayer of the petition is broad enough to authorize personal judgments against the appellants, if under the law the court had power to render such judgments.

A careful consideration of the language of the act inclines us to the conclusion that the assessments are to be made against the owners of the lots, and that the lien is given to secure the payment of the tax. The sixty-fourth section of the charter gives the city a similar lien upon all property taxed for purposes of general revenue. The policy of such legislation is a question into which we have no right to inquire. The legislature, having the power to impose the taxation, cannot be restricted in determining the mode of its collection; nor will this construction enable the city, in any case, to extort from the property-owners, under the guise of taxation, more than the value of the property subjected directly to the tax.

The power to impose this character of taxation must, to some extent, depend upon the fact that the persons taxed are correspondingly benefited by the expenditure thereof. The courts would hesitate to interfere in cases in which it may be a question of doubt as to whether the persons taxed receive commensurate benefits; but where the taxation is so excessive as to render it doubtful whether

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the property to be benefited will suffice to pay the assessments against it, they can no longer be deemed taxation. To enforce their collection would be the exercise of absolute and arbitrary power over the property of the citizen—a power which, under our form of government, does not exist, even in the largest majority. Whenever such a case may arise, the courts will be prompt to afford protection.

We are of opinion that church property can be subjected to the payment of this tax. The terms of the charter leave no doubt that such was the intention of the legislature. It is explicitly enacted that the cost of street improvements shall be exclusively borne by the owners of lots, and that no one is to “be assessed or charged with the improvement of public ways except those binding on the fourth of a square of which his lot forms a part, *apportioned as aforesaid*,” that is, in the proportion the number of square feet of each lot bears to the number of square feet embraced in the one-fourth of the square against which the assessment may be made, corner lots paying twenty-five per cent more than others. Such a rule of apportionment necessarily subjects all the lots in the tax district to the burden, and church property can not be exempted therefrom without doing violence to language, the meaning of which does not admit of question. The exemptions made by the general laws in favor of such property apply only to taxation for the general purposes of government, State, county and municipal. *Lockwood v. City of St. Louis*, 24 Mo. 20; 11 Johns. 77; 13 Penn. 107.

The description of the property decreed to be sold is sufficiently specific to enable the court's commissioner to enforce its judgment.

We are of opinion that the record presents no error warranting a reversal of the judgment of the chancellor; wherefore such judgment must be affirmed.

Judgment affirmed.

NOTE.—See Washington avenue, *ante*, p. 255. That a general statute exempting churches from taxation does not exempt them from assessments for local improvements, was held in *The Matter of Mayor, etc.*, 11 Johns. 77, and the same doctrine has been sanctioned in the following cases: *Baltimore v. Cemetery Co.*, 7 Md. 517; *Pray v. Northern Liberties*, 31 Penn. 69; *St. Louis Public Schools v. St. Louis*, 26 Mo. 469; *Lafayette v. Male Orphan Asylum*, La. An. 1.—REP.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

STATE *ex rel.* CLARK, appellants, v. STANLEY.

(68 N. C. 22.)

Public officer — State directors in corporations.

A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer.

An act providing for the appointment of a director for the State in all corporations in which the State is a stockholder creates an office, and the person so to be appointed is a public officer.

ACTION in the nature of *quo warranto* brought by the State *ex rel.* C. C. Clark and others, against E. R. Stanley and others. The relators, under the act of the legislature of April, 1871, were appointed directors of the Atlantic and North Carolina Railroad Company, on the part of the State, and they bring this action to enforce recognition as such directors. The opinion sufficiently states the point at issue. Judgment below was for defendants. Plaintiffs appealed.

J. H. Haughton, for relators.

Phillips & Merrimon, for defendants.

PEARSON, C. J. "The governor shall nominate and, by and with the advice and consent of a majority of the senators elect, appoint all officers whose offices are established by this constitution, which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the general assembly." Article 3, section 10, of the constitution.

The words — "whose appointment are not otherwise provided for," — evidently mean ; provided for by the constitution, and the words : "No such officer shall be appointed or elected by the general assembly," are superadded as an express veto upon the power of general assembly, to appoint or to elect an officer, whether the office is established by the constitution, or shall be created by an act of the general assembly.

This construction was not contested on the argument, and the case was put by the counsel of the plaintiffs on the ground that the act of April, 1871, which authorizes the president of the senate and the speaker of the house of representatives to appoint proxies and directors for the State in all corporations in which the State is a stockholder, does not create an office.

On the part of the defendants, it was insisted : That the act of April, 1871, does create an office, and that the general assembly appointed officers to fill this new office in violation of article 3, section 10, of the constitution.

A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. This, we consider to be the true definition of a public officer in its original broad sense. The essence of it is, the duty of performing an agency, that is, of doing some act or acts, or series of acts for the State.

Public officers are usually required to take an oath, and usually a salary or fees are annexed to the office, in which case it is an office "coupled with an interest." But the oath and the salary or fees, are mere incidents, and constitute no part of the office : Where no salary or fees are annexed to the office, it is a naked office — honorary, — and is supposed to be accepted, merely for the public good. This definition also excludes the idea, that a public office must have continuance. It can make no difference, whether there be but one act, or a series of acts to be done — whether the office expires as soon as the one act is done, or is to be held for years or during good behavior. This incident, however, need not be considered, for here is continuance ; the duty is imposed upon the

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president of the senate, and the speaker of the house of representatives, for all time to come.

To illustrate our definition : The executive department is an agency for the State, and the governor and others, whose duty it is to discharge this agency, are public officers.

The judicial department is an agency for the State, and the judges are public officers.

The legislative department is an agency for the State, and the members of the senate and of the house of representatives, are public officers.

If it be objected, *Worthy v. Barrett*, 63 N. C. 199, speaks of members of congress and members of the general assembly as not being public officers, the reply is: The language used in that case has reference to the wording of the fourteenth article of the amendments to the constitution of the United States, in which the "senators and representatives in congress and members of the State legislatures" are nominated, because of being prominent objects — easily pointed out by specific terms ; but in regard to the other objects, they could not be pointed out, or nominated by terms so specific, and recourse was had to the more general term, "executive and judicial officers," so the inference that "members of congress and members of the general assembly" are excluded from the original and broad sense of "public officers" is by no means logical. But suppose, in some way, either in that above indicated, or by inadvertence in cases not calling for a precise definition : "Members of congress and members of the general assembly" have been taken out of the definition of "public officers," and are to be styled "public servants." A distinction without a difference, that does not affect an argument, and we may allow this anomalous exception, without at all impairing the force of the conclusion drawn from the legal meaning of a "public officer." The distinction between *Worthy v. Barrett* is this : here, we are treating the terms "public offices and public officers," in the broad, original legal sense in which these terms are used in the constitution of the State. There we were treating the terms in the restricted sense, in which they are used in the fourteenth article of the amendments of the constitution of the United States.

The instances given are offices coupled with an interest. The management of the university is an agency for the State, and the

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trustees upon whom is imposed the duty of discharging this agency are public officers. This office is naked, and merely honorary.

Suppose it be enacted by the general assembly: "There shall be some fit person, whose duty it shall be to see that all persons against whom there is probable cause for the charge of felony are forthwith arrested, and in case any person shall flee from justice, to offer a reward for his apprehension."

SEC. 2. It is further enacted: "That John Smith discharge the duties aforesaid." This is an agency for the State—a public office. It makes no difference whether it be styled "office of general of police," or has no name, or whether there is an oath or not, it is to all intents and purposes a public office. The constitutionality of the act might be questioned, because to make this new office a duty or function of the executive department is taken away; in other words, the material out of which this new office is manufactured is taken from the governor; and in the second place, because the general assembly has filled this new office by its own appointment, contrary to the express provision of the constitution—"no such officer shall be appointed or elected by the general assembly."

Again. Suppose an act: Whereas, experience has proved that the governor has made an ill use of the power of appointment, it is enacted: There shall be two fit persons, to be styled "appointors general," whose duty it shall be to appoint all public officers and to fill all vacancies.

SEC. 2. It is further enacted: "The president of the senate and the speaker of the house of representatives shall be the appointors general." This act is clearly unconstitutional, for, in the first place, in order to create this new office, it takes from the governor a duty or function vested in him by the constitution; and in the second place, the general assembly fills the office by its own appointment, contrary to the express veto of that instrument.

This is the case under consideration. True, it is on a larger scale and covers more ground; but, although differing in degree, it is the same in principle. A new office is created. It is not so in name, but is in effect the office of "appointors for officers in all corporations in which the State is a stockholder," and in order to create the office a duty or function of his office is taken from the executive, and the appointment of these "appointors for corporations" is made by the general assembly.

If it be said there is this distinction: The "appointors general"

in the supposed act are to appoint all State officers, whereas the "appointors for corporations" are confined to State proxies and directors, and these are not officers of the State, but of a corporation in which the State is a stockholder. The reply is: This is a distinction without a difference, even should it be conceded that the proxies and directors are not public officers — into which question we will not enter, for our concern is with the office of "appointors for corporations," and not with the persons they may appoint to these offices. To the suggestion, the act of April, 1871, does not purport to create an office or to fill it, the reply is: Such, obviously, is the legal effect of the act. When analyzed, it will be found to contain two provisions: There shall be an agency for the State to make the appointment of all State proxies and State directors in corporations. This creates a public office, and it can make no difference that it is called the office of appointors of State officers for corporations, or has no name given to it. In the second place, the officers who are to discharge this duty are appointed by the general assembly.

We declare our opinion to be, that the statute is unconstitutional, and that the relators are not entitled to the offices claimed. We put our opinion upon familiar principles and plain analogies of the law which are intelligible to every one. The many cases cited on the learned argument with which we were favored, are not referred to, because a full discussion of them would tend rather to obscure than to elucidate the subject.

We will only refer to *Hoke v. Henderson*, 4 Dev. 12; that mine from which so much rich ore has been dug. In the able and elaborate opinion of Chief Justice RUFFIN, we find an instance of a public officer clearly in point, which fully confirms our conclusion. It sustains the distinction between a naked honorary office like the one which we have been discussing and an office coupled with an interest. It sustains our conclusion, that the duty of *appointing to an office, constitutes of itself* a public officer, and there is the further coincidence of indefinite continuance by conferring the new office upon the incumbents of offices already established. On page 21 he says: "The distinction in principle between agencies of the two kinds is obvious, the one is for the public use exclusively, often neither lucrative nor honorary, but onerous. The other is for the public service conjointly with a benefit to the officers. The distinction which I am endeavoring to express, may be fully exemplified

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by the difference between the public agency in appointing, and that exercised in discharging the duties of a clerk. By the law the judges of the superior courts, and the justices of the county courts were authorized to appoint the clerks of their respective courts; that power is *an office* in the extended sense of that word, which originally signifies duty generally, but it is not a lucrative or valuable office; it was a duty to be performed exclusively for the public convenience, and with reference to it alone, without any benefit immediate or remote to the judges or justices as individuals. "The courts in this respect are not exercising a *judicial* function, not serving for emoluments, but were mere ministers of the law, and naked agents of the body politic, to effect an end purely public." "But when the country has through those agents appointed a clerk, though he is also a servant of the public, yet he is something more than a naked, uninterested political agent."

2. Another ground was taken for the defendants: It is the one on which his honor in the court below put his opinion. By the act of 24th of March, 1870, the governor is authorized to appoint proxies and directors for the State in corporations in which the State was a stockholder, prior to the adoption of the present constitution. This act was assented to, as an amendment of the charter by the corporators of the Atlantic and N. C. Railroad Company, at a general meeting in June, 1870; and it is insisted that the act of April, 1871, which authorizes the president of the senate and the speaker of the house of representatives, to appoint proxies and directors for the State, in all corporations in which the State is a stockholder, and repeals all laws in conflict therewith, and forbids the governor to make such appointments, is unconstitutional in this: It violates the charter of the company, and varies the contract without the assent of the corporators. Reply: It may be the company has a right to complain of this change in the charter, but it is an act of the State, and, as both the defendants and the plaintiffs profess to be acting under the authority of the State, neither can be heard to make the objection. Rejoinder: The defendant's title is not involved; the title of the relators is alone in question; and they cannot make good a title under an act which involves the charter of the company. Surrejoinder: By article 8, section 1 of the constitution: "corporations may be formed under general laws," etc.; — "all general laws and special acts passed pursuant to this section may be altered from time to time, or repealed;" — true, this

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does not apply to corporations chartered before the adoption of the constitution, but the Atlantic and North Carolina Railroad Company by accepting the amendment of their charter by act of March, 1870, placed itself, in that respect, upon the footing of a corporation chartered after the adoption of the constitution; and the power of the general assembly to alter the charter from time to time, or to repeal the amendments, attaches to this corporation.

This is an interesting question, into which we will not enter, as its determination is not necessary for the purpose of our decision, and in regard to it, the corporation has not been heard.

The judgment of the court below is affirmed with costs.

BOBBITT V. THE LIVERPOOL AND LONDON AND GLOBE INSURANCE
COMPANY, appellant.

(88 N. C. 78.)

Fire insurance — application, when warranty.

A policy of fire insurance was indorsed with the following condition: "The basis of this contract is the application of the insured, and if such application does not truly describe the property this policy shall be null and void." The application concluded as follows: "And the said applicant hereby covenants and agrees . . . that, the foregoing is a just, full and true exposition of . . . the condition, situation and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk." In an action on the policy, *held*, that the application was a part of the contract, and in the nature of a warranty or condition precedent; also, that it was necessary for the plaintiff to set out the application in his complaint, and aver and prove the observance of the warranty or condition.

A representation in an application for a policy of fire insurance need not be both fraudulent and false to vitiate the insurance; it is sufficient that the representation be false.

ACTION on a policy of fire insurance issued by defendant to and in the name of one Newman, the agent of plaintiff, upon a quantity of tobacco. The opinion states the facts. Verdict and judgment for plaintiff. Defendant appealed.

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Lamier, for appellant.

Phillips & Merriman, W. A. Graham, Moore & Gatling, and L. C. Edwards, for appellee.

READER, J. The plaintiff made a written application to the defendant to insure his property, in which application he undertook to describe the property, its character, quantity, value and situation. In consequence of that application, and the payment of \$500, the defendant agreed to insure the property for twelve months against fire, or to pay \$20,000, if the property should be burned, if the loss should be so much, or else as much as the loss should be, and gave the plaintiff a policy to that effect.

The application was a printed form, furnished by the defendant, with questions to be answered, and with blanks for the answers, and the blanks were filled up in writing by the plaintiff and signed by him. There was a printed heading to the application, setting forth that, "the estimated value of personal property, and of each building to be insured, and the sum to be insured on each must be stated separately. When personal property is situated in two or more buildings, the value and amount to be insured in each must be stated separately, three-fourths only of the value to be insured," etc.

The application described the property insured as "raw and manufactured tobacco, in a two-story frame building," etc. And in answer to question eight, of the form, "what is the present cash value of the property on which insurance is wanted?" the response is, "the present cash value of the tobacco on hand is \$30,000, and it will be increased to \$50,000, the average value on hand say \$30,000." And the application concludes, in print, as follows: "And the said applicant hereby covenants and agrees to, and with said company; that the foregoing is a just, full and true exposition of all the circumstances with regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk."

Upon that application the defendant issued to the plaintiff a \$20,000 policy, in which it is expressed to be "subject to the conditions and stipulations indorsed on the back of the policy, which constitute the basis of this insurance."

One of the aforesaid conditions and stipulations on the back of the policy is as follows:

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“1. That the basis of this contract is the application of the insured, and if such application does not truly describe the property this policy shall be null and void.”

The first question for our consideration is, what is the nature and effect of that application? Is it a part of the contract, and in the nature of a warranty or condition precedent that the property was as described, or is it a representation preliminary to and outside of the contract?

It may be premised that insurance contracts are in general subject to the same rules of construction as other contracts. And it is a familiar rule that where there are several separate writings, all about the same matter, between the same parties, referring to each other, and all necessary to complete the whole, they are all to be read together as if they were all one. Apply that rule to the case before us. The application asks for the policy and describes the property, and covenants for the verity of the description. The policy is issued as asked for in the application, and refers to another writing on the back of the policy for the “conditions and stipulations subject to which it is issued.” And that writing refers back to the application, upon the verity of which the policy is to be valid or null and void. Take away either of these writings, and the contract would be incomplete, and the rights of the parties could not be declared. Read them together, and the contract amounts to this :

The plaintiff proposed to the defendant to insure him \$20,000 on property, the “present cash value of which was \$30,000,” and to continue on an average about that value for twelve months, and that the property was at that time and would continue to be in a certain two-story framed building, which was described. And the defendant agreed that if the plaintiff would give him \$500 he would make the insurance, and would pay him \$20,000 in case of fire, if he should lose so much, or such less sum as the loss might be; with the understanding that the property was as described, and should continue so to be, else he was to pay nothing at all.

This view of the case will be found to be abundantly supported by *Parsons on Contracts*, *Parsons on Marine Insurance*, and *Archbold's Nisi Prius*, title “Insurance,” and by the adjudged cases cited by them. It is sufficient to quote the following from *Archbold* :

“Modern policies of insurance usually contain a number of conditions, stipulations, warranties, etc., either in the body of the instru-

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ment, or indorsed upon it. Frequently the policy refers to certain printed proposals of the company, as containing the terms of the contract, and in such cases such printed proposals must be deemed a part of the policy, even although they be without stamp, or seal, or signature."

The application being, therefore, a part of the contract, an important inquiry was, whether the property was correctly described in the application. And the first question is, upon whom was the burden of proof? The burden of proof is upon the plaintiff. It would be otherwise if the application were not a part of the contract, but was a mere representation.

Being a part of the contract, it was necessary for the plaintiff to set it out in his complaint; and it being in the nature of a warranty or condition precedent, it was necessary that the plaintiff should prove it. Archbold says: "Where conditions are indorsed upon the policy, or contained in certain proposals referred to in the policy, they must be set out in the declaration, and there must be an averment showing that the plaintiff has observed them. And where a compliance with them is in the nature of a condition precedent to the plaintiff's right to recover, a strict compliance must be observed." And again: "If an averment of compliance with any of the conditions indorsed on the policy, or contained in any of the proposals of the company referred to in the policy, be traversed, then, if the traverse be in the negative, the plaintiff must prove the averment; but if the averment be in the negative and the traverse be in the affirmative, the defendant must prove his traverse. And if any of these be a condition precedent to the plaintiff's right to recover, the compliance with it must be strictly averred, and as strictly proved."

The complaint in this case, article 6, does aver that the plaintiff had "fulfilled all the conditions of the insurance," but it does not set out the conditions embraced in the application, under the idea, we suppose, that they were not a part of the contract. This defect may be remedied by an amendment at the discretion of the judge below, when the case goes back if the plaintiff choose to move. The defendant's traverse is also general. But considering the complaint to contain all the necessary averments, and the defendant's traverse to be in the negative — which is the most favorable view for the plaintiff, because as we have seen it is necessary that the complaint should contain them — then the burden of proof is upon the plaintiff; and he must show that the cash value of the property at the time of the

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application, or at least at the time the policy issued was \$30,000, and that it continued to be about that up to and at the time of the fire.

It was much insisted on in the argument here, that even if the description of the property was false, yet it was *immaterial*, and therefore did not interfere with the plaintiff's right to recover. But the doctrine of immateriality does not apply when the representation is a part of the contract, and especially when it is in reply to a direct question. "Where the representation is no part of the contract, it vitiates the policy as being a fraud merely; and therefore if it be immaterial or be substantially complied with, it will not affect the validity of the policy." But if the description of the property were not a part of the contract, but were a mere representation, still it is a great mistake to say that it is immaterial. It was said to be immaterial because the policy compels the defendant not to pay \$20,000, but only so much as should be lost by the fire, and therefore the less property on hand to be burned, the less risk for the defendant and the better for him. If that were so it would be difficult to account for the provision in the policy that the defendant would not insure for more than three-fourths the value of the property on hand. The reason for this limitation is, plainly, to make it to the interest of the plaintiff to take care of the property, and to prevent the dangerous temptation to destroy it for gain. No one can suppose that the defendant would have insured the plaintiff \$20,000 if he had supposed that the property was only worth \$20,000, or probably not half so much.

From what we have said, it will appear what were the errors on the trial below, without noticing the defendant's many exceptions, *seriatim*. His honor informed the jury that the application was not a part of the contract; that it was a mere representation, and that the only inquiry for them was the value of the tobacco burned. And he very emphatically excluded every thing else from their consideration. All this was error.

It is said, however, that a subsequent part of the charge cures these errors. His honor closed his charge by saying: "The statements in the application were mere representations, and, unless they were fraudulent and false, they would not bar the plaintiff's right to recover." If this were so in theory, still it would be dangerous to allow a verdict to stand where there is so much probability that the jury were misled. After he had emphatically told them that the

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only inquiry was, how much tobacco was burned, what did they care for "mere representations," which were "no part of the contract." But it was not right in theory. Let it be supposed that the statement of the value of the tobacco was a mere representation—a representation of a *fact*—and that representation was *false*, but not fraudulent, and misled the defendant in a material matter; the plaintiff could not recover. A representation as an *opinion*, must be not only false, but fraudulent; but not so with the representation of a *fact* as distinguished from an *opinion*. The principle is very well stated by Archbold:

"As the underwriter calculates his risk by what is told to him by the insured at the time of effecting the insurance, the law exacts from the assured, not only that he states all he knows material to the risk, but that what he states shall be perfectly true—insurance being a contract in which the utmost good faith is required to be observed on the part of the assured, and if, upon effecting an insurance, any representation is made to the underwriter, which is material, and if true, would lessen the risk, if such representation turn out to be false, it will have the effect of vitiating the policy. And it matters little to him whether the party making the representation knows it at the time to be false, or does not know whether it is false or true, or believes it to be true from the representations of others," etc. So that his honor erred in telling the jury, that the representations must be "false and fraudulent." It was sufficient to avoid the policy if they were false, however honestly made; because it was the representation of a fact calculated to mislead, and not an expression of opinion or belief.

When the case is tried again, the application, the policy and the conditions and stipulations must all be considered as one instrument, as containing the contract. And the plaintiff must aver and prove compliance with all his part of the contract.

If the plaintiff recover, he is entitled to the value of the property burned, which was embraced in the policy, not exceeding \$20,000. The value of the tobacco was what it was worth then and there, what it would have sold for then and there, or what it would have netted the plaintiff in the usual markets, after paying stamp duty and all other usual and necessary expenses.

We do not sustain the defendant's exception, that the plaintiff had no insurable interest.

There is error.

Venire de novo.

SUTTON AND WIFE, appellants, v. ASKEW.

(86 N. C. 172.)

Husband and wife—right of dower.

Before the act of 1868-69 of the legislature of North Carolina, a widow was entitled to dower in such lands only as the husband should die seized of. By this act the law of dower was changed so as to give the widow dower in all lands of which the husband was seized during coverture. *Held*, that this act did not prevent a husband, married before the act, from selling lands also owned before the act; and that an agreement to pay the wife a certain sum for her right of dower, on such sale, was void against creditors for want of consideration.

PROCEEDINGS against the property of a judgment-debtor. The judge found the facts as follows:

"The judgment-debtor, J. A. J. Askew, in the year 1870, was the owner of two houses and lots, and a store-house, in Bertie county, and proposed to one Augustus Holly, to borrow two thousand dollars, and to secure him in said loan, by a deed of trust, upon said houses and lots. The said Holly was unwilling to take the security unless the defendant, the wife of said Askew, would join in the conveyance with her husband. The defendant, Maria C. Askew, refused to join in the conveyance, unless she was compensated for releasing her right of dower and homestead. Whereupon, it was agreed, that if the said Maria C. Askew would join in the conveyance, she should have the balance of the money arising from the proceeds of the sale of the houses and lots, after paying Holley the principal and interest of his money. With this understanding the deed was executed. The houses and lots were afterward sold by the trustee for \$3,400, and out of the proceeds, the debt and interest to Holley, and the expenses of the trust, etc., were paid off and discharged.

The lots were sold on a credit, and the purchaser gave in part payment, two notes, one for \$500, and one for \$481. These two notes the trustee indorsed without recourse to the defendant, Maria C. Askew, in furtherance of the agreement which had been made with her. All of the \$481 note, with the concurrence of Maria C. Askew, had been collected and paid to the creditors of her husband,

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before the judgment of the plaintiff, except about \$100, which was agreed to be paid. The other note of \$500 was retained by the said Maria C. Askew, and claimed as her property. The conveyance to Holly was made before the plaintiff's judgment was obtained. J. A. J. Askew and Maria C. Askew were married before January, 1867. The debt due the plaintiff was contracted previous to the making of the deed in trust. Upon this state of facts, the court was of opinion that the property, in the \$500 note, was in Maria C. Askew, the defendant, and dismissed the proceedings and gave judgment against the plaintiff for costs. Plaintiff appealed from this judgment."

W. N. H. Smith, for plaintiff.

D. A. Barnes, for defendants.

READE, J. The single question is, whether the act of 1868-69, restoring to widows their common-law right of dower, *i. e.*, dower in all the lands of which the husband was seized during coverture, prevents a husband from selling lands which he owned before the passage of the act, his marriage having been before the act. If the act has that effect, it must be because it gives the wife an inchoate right to dower, to be consummated upon the death of the husband, she surviving, and of which she cannot be deprived without her consent; for, certainly, before the act, it was never supposed that the husband could not sell his lands at pleasure, without the consent of his wife. If the act has that effect, then her consent in this case to the sale, was a sufficient consideration to support the agreement to give her a part of the sale-money. If the act had not that effect, then her consent was immaterial, and afforded no support to the agreement, to give her a part of the sale-money, and, therefore, as against creditors, the transaction was void. It is a dry question of law, and must be considered; although it is admitted to be one of great importance, and by no means free from difficulty.

Since 1784, and until the act aforesaid, 1868-69, a widow was entitled to dower in the lands only, of which the husband died seized and possessed, and, therefore, but few questions have arisen in our State in regard to dower-rights, and none probably in regard to inchoate dower-rights. But the important change which that act (1868-69) made, involves the subject in much uncertainty, and will breed much litigation. What adds to the uncertainty is, that the

different States have different laws in regard to dower, and the decisions in the State courts are numerous and conflicting. Some of the decisions holding, that acts like ours are retroactive, and others holding them to be prospective, only. And the reasons which would be proper in one case, are inconsiderately used in the other. *Scribner on Dower*, a late American work, reviews the statutes and decisions of the different States, and also the English authorities and by judicious comments, has endeavored to produce some order out of much confusion. But, speaking of the inchoate right of dower as property, he says: "A certain vagueness of expression, uniformly characterizes the discussion of the subject, and these discussions are commonly attended with unsatisfactory results." And so we see that this great right, favored like life and liberty, instead of being as it ought to be, and as until lately it has been, so plain, that he that runs may read, is now involved in much confusion, by inconsiderate legislation and conflicting adjudications.

It has been much discussed, whether marriage is a contract, or an institution, or a sacrament, or all combined; and, especially, whether dower results from the contract of marriage, or from the operation of law. Suppose it to result from the contract of marriage, then it is discussed, whether the legislature can change the law of dower, without impairing the obligation of contracts. Suppose it to result from the operation of law, then it is discussed whether the legislature can change it without interfering with vested rights, and whether the law cannot change, modify, increase or abolish it. Those who claim to be up with the chivalry of the age, and while the legislature are liberally *enlarging* the dower-right, insist, that the legislature have full power over the subject. But suppose upon some occasion, when the chivalric element may less prevail in legislation, they should *curtail*, or even *destroy* the right, how then? And if the dower-right is so frail that a widow may be deprived of it without her consent, how was her consent to the deed in this case important, even supposing the act to be retroactive; and if not important, then it was no consideration, and, if no consideration, then the contract was void. So that the agreement is suicidal. If the right to dower is at the mercy of the legislature, to increase or diminish, continue or destroy, then it is nothing — nothing as a right — nothing as property! We think that this great right, sacred as life, and indispensable to society and the family economy, ought to be more secure, ought to be inviolable, when once it exists whether it

be created by contract, or by operation of law. And we, by no means, subscribe to the doctrine that a right vested by operation of law, is less inviolable than when it arises from contract, when once it exists, no matter how it is inviolable. Nor is it true, that, in any conceivable case, private property can be taken for public use, or, as is said in this case, for the "paramount public good," without just compensation.

Our conclusion from what has been said is, that, before the late act, a widow was entitled to dower in such lands as the husband should die seized and possessed of, and in no other; that the right to be so endowed commenced (whether by the contract of marriage, or by operation of law, makes no difference), at the time of the marriage, but subject to the husband's power of sale, and contingent upon his not selling it, and upon her surviving him, and that the legislature could not deprive her of that right, or in any way change it without her consent. The act of 1868-69, comes in and changes the law of dower, so as to give the widow dower, not only in all the husband owns at the time of his death, but in all that he owned during coverture, but this act does not affect rights, or marriages, which existed *before* its passage; they stand as they did before the act, when the husband could sell without the consent of the wife; and therefore the consent of the wife, as in this case, was immaterial, and afforded no consideration to support the contract.

We have not overlooked the fact, that the deed in this case does not profess to release the wife's dower-right, if she has any, or to covenant against the incumbrance of dower; because under the view which we have presented, it is not necessary. But it would seem, that before the widow can set up her consent as a consideration to support a contract, to give her a part of the sale-money, it ought to appear that she had released her dower-right, or covenanted against the incumbrance and, *quere*, whether in any case, it could depend upon parol evidence, and whether the contract must not be set out in the deed, and appear to be fair and reasonable?

All this is said, but with little consideration as to the rights of the husband. But has the husband no rights which are entitled to respect, and which the legislature cannot destroy? Before the late act, when a man married, owning land, his wife had an inchoate right to dower, contingent upon his not conveying it away in his life-time, and upon her surviving him, precisely the same as if it had been conveyed to him by deed from another, with such stipu-

lation and conditions. Suppose it had been so conveyed to him, could the legislature step in and alter his title or change the conditions? No one will so contend. Well, what matters it how his title was derived and how the conditions and stipulations came about, so that, in fact, they existed? Here, then, was the simple case of a man owning a track of land, absolutely and in fee simple, with full power to sell the same, subject only to the condition that, if he did not sell it, and should die seized and possessed of it, his wife should have dower; and the legislature steps in and forbids him to sell, compels him to hold it as long as he lives, and gives his wife dower in it in spite of him. If this be not depriving him of his vested rights, taking his property from him and giving it to another, under the notion, as is said, of the "paramount public good," without compensation, then we cannot understand what would be an instance of such a violation of the rights of property.

It would probably be no great hardship upon the husband, married before the act, and it would probably not interfere with his vested rights to allow the act to operate upon all lands *acquired after* the passage of the act, because he would have notice of the incumbrance which would attach, and he would take it *cum onere*. But, as to this, we give no opinion.

And so it may be that, in all cases of marriage since the passage of the act, the wife may refuse to join in the conveyance unless she is compensated; and an agreement to give a part of the sale-money for her consent to the sale may be good, her dower-right attaching to *all* the lands of her husband, and contingent only on her surviving him, a reasonable probability, and not a mere possibility. And, *quere*, whether the legislature, by any subsequent act, can deprive her of this right. But these questions are not before us.

II. If the dower-right did not afford a sufficient consideration to support the agreement to give the wife a part of the sale-money, then, in the second place, it is insisted, that her homestead right did.

There is this difference in the dower act and the homestead act. The homestead act applies only to the homestead, used in the sense of the home, or dwelling-house, whether actually set apart or not; or the homestead, after it is set apart, upon proceedings had for that purpose.

The lands in question had not been set apart as a homestead upon proceedings instituted for that purpose, and it is not distinctly stated that they were the homestead or dwelling in the general

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sense. The case describes them as "two houses and lots—one a store-house." There is nothing in this to indicate that they were the homestead. Nor is there any thing to indicate whether the husband did not have other lands, and whether he did have lands which he had used, or which, after this sale, he did not intend to use as a homestead. Nor is it stated whether he was insolvent. Nor is it stated whether he had children. Nor does it appear from the case stated, nor from the deed, nor in any other way, what was the estimate put upon her homestead right. Nor is there any covenant in the deed against the homestead right, nor is there any release. And surely it cannot be, under the most liberal construction of the homestead act, that the wife is entitled to have her homestead taken out of every tract of land the husband may own, and may wish to sell. It is true that, by reference to the deed, we find that, in describing the lots, it is said, "one being the house and lot upon which we reside," and that is all; and whether temporarily or permanently, or whether he had not another which he had adopted, or intended to adopt as a homestead, is not said. And both lots are put together, and her homestead right claimed in one as much as the other. No price being fixed upon either, and no estimate of the value of her homestead. So that if, hereafter, if she should claim a homestead in other lands, there is nothing in the transaction to estop her, or even to show how much she has received in the way of her homestead right in this transaction, so as to deduct it from any subsequent claim. So we think that, as the case appears to us, she has made out no homestead claim, the surrender of which was a sufficient consideration to support the agreement.

We have not overlooked the fact that the provisions in the constitution and in the homestead act, giving to widows homestead rights, seem not to be precisely the same. The constitution seems to contemplate that the widow should have a homestead only in the event that there were no children, while the act seems to prefer the widow to the children. If there is a conflict in the provisions, it would seem that the constitutional provision should prevail. But we do not decide the question, because it is not necessary.

There is error. And judgment would be rendered here for the plaintiff, but it does not appear what amount is due from Sessoms, so that this opinion must be certified to the court below, to the end that the amount of the indebtedness of Sessoms be ascertained, and

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judgment for that amount, or for so much less as may be necessary to satisfy the judgment of the plaintiff against J. A. J. Askew, be rendered against Sessoms in the court below.

CLERK'S OFFICE V. THE PRESIDENT, DIRECTORS AND COMPANY OF
THE BANK OF CAPE FEAR.

(88 N. C. 214.)

Bankruptcy—lien on funds paid into court. Costs.

Funds were paid into a State court for J. S., and other persons obtained judgments for costs against him, and execution was issued thereon, but returned unsatisfied. *Ordered*, that the amount of the costs be deducted from the funds, notwithstanding J. S. had been adjudged a bankrupt about the time the judgments for costs were obtained.

MOTION to secure a deduction of costs from funds in court belonging to defendant. The opinion states the case.

W. H. Bailey, for motion.

J. M. McCorkle, contra.

RODMAN, J. *Case*. At June term, 1871, of the supreme court, the bank of Cape Fear recovered a judgment against R. A. Caldwell for \$324, and costs, 90 cents, upon which a *feri facias* execution issued, tested the first Monday in June, 1871, and returnable to January term, 1872, under which the money was paid into the clerk's office, where it now is.

In the same case it was adjudged that the said Caldwell recover of the bank costs, taxed at \$4.20, for which a like execution issued against the bank, and is returned unsatisfied.

At the same term (to wit: June, 1871), Nathaniel Boyden recovered against the bank costs of the supreme court, taxed at \$42.10 (forty-two $\frac{10}{100}$ dollars), upon which a like execution issued, and is returned unsatisfied.

The bank was adjudicated a bankrupt on a day not particularly

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stated, but just before or just after the commencement of this term, and an assignee has been appointed. It is moved, on behalf of the clerk's office, for an order to retain the above costs out of the funds in court.

If the question was unaffected by the operation of the bankrupt act, there can be no doubt about the power of the court. The case of *Clerk's Office v. Allen*, 7 Jones, 156, shows the practice prior to C. C. P., and the power is not taken away, but rather confirmed, and extended by sections 265, 266, 268 and 269 of the Code.

It is contended, on behalf of the assignee in bankruptcy, that the whole sum recovered against Caldwell passed to the assignee under section 14 of the bankrupt act, subject only to existing liens, and that here is no lien, and, therefore, it is not in the power of this court to apply any part of the funds in the way proposed.

We do not profess to be familiar with the decisions of the numerous bankrupt courts throughout the country, nor have we access to the books in which they are reported. None of the cases cited to us by counsel, from the Bankrupt Register, so far as we can judge from the brief extracts furnished to us, appear to decide the present question, and we must, therefore, be governed in our opinion by general principles.

It is conceded that this is not a case of lien. But we conceive, as was said in *Carr v. Fearington*, 63 N. C. , that an assignee in bankruptcy more nearly resembles a purchaser of the bankrupt's property at an execution sale than any other familiar character to which we may liken him. He takes the bankrupt's rights, but he takes something more; he is not bound by the fraudulent conveyances of the bankrupt as he himself would. He cannot take paramount to all equities against the bankrupt, as, in many cases, that would be manifestly unjust. The only intermediate position possible is that of a purchaser at execution sale, who acquires the rights of the debtor in the property, and also the rights of the creditor to impeach any prior fraudulent conveyances, but who takes subject to all equities against the debtor in the property purchased. This view of the character of the assignee is sustained by sections 1038, 1228, 1229 and 1411, of 2 Story's Eq. Jur., to which we were referred by counsel. In this case, we think, there was what may be called an equity existing in the clerk's office to have its costs paid out of the fund of the bankrupt in court, and affecting the particular property of which the assignee may be called the purchaser, and subject to

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which, therefore, he took. We do not see that it can make any difference whether the adjudication of bankruptcy was before or after the commencement of the present term of this court. So long as the fund came lawfully into this court it remains there under its control, and subject to be applied according to its usual practice. We do not think that it was the intention of the bankrupt act to deprive the ordinary courts of that power. It is not the giving of a preference to one creditor of the bankrupt over another; but merely the giving effect to an equity existing by virtue of the long settled regular practice of the courts.

The clerk will retain the costs due his office out of the fund, and pay the residue to the assignee of the bankrupt.

LAMBETH, administrator, appellant, v. NORTH CAROLINA R. R. Co.

(66 N. C. 494.)

Common carrier — injury to passenger in alighting from railway train. Contributory negligence.

Plaintiff's intestate was killed in alighting from defendant's railway train, while moving at the rate of from two to four miles per hour. It appeared that the conductor went with the intestate, who was a passenger, out on the platform, to assist him to alight. *Held*, that "if the intestate, without any direction from the conductor, voluntarily incurred danger by jumping off the train while in motion, the plaintiff was not entitled to recover; but if the motion of the train was so slow that the danger of jumping off would not be apparent to a reasonable person, and the intestate acted under the instructions of the conductor, then the resulting injury was not caused by contributory negligence or want of care."

ACTION for the negligent killing of one Brown, plaintiff's intestate, by defendant, a common carrier by railroad. The intestate was killed in getting off the cars while in motion. At the trial much evidence was given, but only questions of law are considered in this court. Plaintiff requested the judge to charge "that if the jury should find that the defendant did not stop the train alongside of the platform, and that the conductor while passing the platform, and when the cars were moving at from two to four miles per hour,

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directed Brown to alight, and he obeyed the direction, he was justified in doing so, and his act in law is not contributory negligence, hindering a recovery." This request was refused, and the judge charged that "any alightment from the cars when moving was contributory negligence, and in law" prevented a recovery.

Verdict and judgment for defendant. Plaintiff appealed.

Dillard & Gilmer, for appellant.

J. T. Morehead, Jr., for appellee.

DICK, J. The intestate of the plaintiff was a passenger under the charge of the agents of the defendant, and he was killed in getting off the train. The policy of the law, which is ever solicitous for the protection of human life, requires common carriers who have charge of the safety of passengers to use a high degree of care, to guard against probable injury. As the intestate was a passenger on the train, it was the duty of the defendant to transport and place him safely at his point of destination.

If the injury sustained was caused by a want of proper care on the part of the agents of the defendant in the performance of this duty, it is *prima facie* responsible in damages to the plaintiff.

The principal defense relied on in the court below was, that the intestate, by his own negligence or misconduct, contributed to cause the injury sustained. The act of the intestate, in jumping off the cars while they were in motion at the rate of from two to four miles per hour, was the proximate cause of the injury, and the question is, whether he exercised ordinary care under the circumstances. Ordinary care, in this case, is that degree of care which may have been reasonably expected from a sensible person in the situation of the intestate. He had a right to expect that the defendant had employed a skillful and prudent conductor, who would not expose passengers to dangerous risks, and who had experience and knowledge in his business sufficient to correctly advise and direct passengers as to the proper time and manner of alighting safely from the train.

When the usual signal was given for stopping or slackening the speed of the train, the conductor went with the intestate and Mr. Anthony out on the platform of the car to assist them in getting off safely. If the intestate, without any direction from the con-

ductor, voluntarily incurred danger by jumping off the train while in motion, the plaintiff is not entitled to recover. If the motion of the train was so slow that the danger of jumping off would not be apparent to a reasonable person, and the intestate acted under the instructions of the manager of the train, then the resulting injury was not caused by contributory negligence or a want of ordinary care. Shearman & Redf. on Neg., ch. 15 and 27.

The circumstances attending the injury are given in the testimony of Mr. Anthony and the conductor, who were both present, witnessed the occurrence, and had equal opportunity of knowing the facts. Their testimony was conflicting in material points, and it was the province of the jury to determine the truth of the matter, and render a verdict in accordance with the instructions of his honor on the questions of law arising upon the ascertained facts. We think his honor erred in refusing to give the first instructions asked for by the counsel of the plaintiff, for, if the testimony of Mr. Anthony is to be believed, there was no such contributory negligence on the part of the intestate as to prevent a recovery in this action.

For this error there must be a *venire de novo*, and it is not necessary for us to express an opinion as to the rights of the parties, if the jury should find that the testimony of the conductor gives the truth of the transaction.

Let this be certified.

Venire de novo.

CASES
IN THE
COMMISSION OF APPEALS
OF
NEW YORK.

BALL, appellant, v. LINNY.

(48 N. Y. &.)

Bailment — conversion by bailee — conflicting claims — property taken in execution.

Plaintiff sent his goods, in charge of G., to defendant's warehouse for storage. G. put his name on the goods, and left a written notice with defendant not to give them up without his consent. Plaintiff then sent a written notice to defendant saying: "Please hold the same, subject only to my written order. The property is mine." Soon after, plaintiff demanded the goods of defendant, who refused to deliver them up, even after plaintiff had offered him a bond of indemnity, and to pay all charges. Subsequently a sheriff levied on the goods, under two executions against G., and, on the following day, an execution against plaintiff came into the sheriff's hands. The goods were sold on one of the executions against G., and the proceeds applied in payment thereof. *Held*, that defendant was liable for the value of the goods on the ground that he ought to have given up the goods on demand and offer of indemnity by plaintiff, or commenced a suit by bill of interpleader to determine the respective rights of plaintiff and G.; and that, as the goods were in fact plaintiff's, the levy and sale of them under an execution against G. did not mitigate the damages, notwithstanding the fact that the sheriff also held an execution against plaintiff, under which he did nothing.

ACTION to recover the value of goods stored in defendant's warehouse. The case was referred, and, from the report of the referee,

the following facts appear: On the 31st of March, 1862, plaintiff sent goods belonging to him, in charge of one Gregory, to defendant's warehouse for storage. Gregory marked the goods with his initials, and subsequently made out a list of the articles, and left it with defendant. The list began as follows:

"A list of articles stored by George G. Gregory, agent, with A. Liney, River street, Troy, N. Y. The said goods not to be given up without the consent of said George G. Gregory."

Soon after the goods were received on storage by defendant, plaintiff called on defendant and informed him that the goods belonged to him, and that he desired defendant to keep them on storage until the further order of plaintiff. And, on the 28th of April, 1862, plaintiff gave defendant the following written notice:

"MR. A. LINEY:

"*Dear Sir:* Mr. Gregory has furnished me with an invoice of the goods in storage in your loft, and you will please hold the same subject only to my written order. The property is mine.

"Yours,

"M. BALL."

Defendant received the notice and soon after told plaintiff he would act upon it. On the 15th of May, 1862, plaintiff demanded the goods, offering to pay charges and to give defendant a bond of indemnity upon their removal. The demand was refused, and plaintiff again made similar demands and offers from that time to August 5, 1862, all of which were refused, Gregory having forbidden defendant to give up the goods. On the 6th of August, 1862, the sheriff of Rensselaer county levied upon the goods, having in his hands two executions against Gregory, one in favor of H. B. Harvey and the other in favor of J. R. Jaffray. The goods were taken by the sheriff without objection from defendant, and on the following day an execution against plaintiff, in favor of M. T. Clough, came into the sheriff's hands. The sheriff advertised to sell the interest of Gregory and plaintiff in the goods, but at the sale the sheriff stated that he would sell the goods under the Harvey execution against Gregory. The goods were sold and the proceeds applied upon the Harvey execution, and the sheriff returned the execution in favor of Clough against plaintiff unsatisfied. The referee found in favor of plaintiff. The general term granted a new trial, whereupon plaintiff appealed to this court.

Ball v. Liney.

John H. Reynolds, for appellant.

John B. Gale, for respondent.

EARL, C. It is undisputed that the plaintiff owned the goods which were stored with defendant. Indeed, no effort was made upon the trial to impeach his title. The defendant was, therefore, bound, upon demand, to deliver the property to the plaintiff; and an unqualified refusal to do so would, in law, amount to a conversion. *Rogers v. Weir*, 34 N. Y. 463; *Holbrook v. Wright*, 24 Wend. 169; *Wilson v. Anderson*, 1 Barn. & Ad. 456. But the defendant insists that he was so embarrassed by the conflicting claims to the property by the plaintiff and Gregory that he was justified in not complying with plaintiff's demand.

It was undisputed upon the trial that Gregory was merely plaintiff's agent, and that, as such, he took the property to the defendant's warehouse. He could give the defendant no authority to detain the property from his principal. The defendant had the right to qualify his refusal to deliver the property to the plaintiff until he could, in good faith, investigate the facts as to the real ownership of the property, and he could properly retain the property for a brief period for that purpose. But he had no right to ask that the plaintiff should get an order from Gregory, his agent, before he would make the delivery; and he had no right to call upon the plaintiff to litigate or quiet Gregory's claim. It does not appear that he prosecuted any inquiries as to the title of the property; and it does not appear that he had any reason to believe that it belonged to Gregory, for, when the latter brought it to the warehouse, he simply claimed to be agent, and marked his name upon the property as agent. But if the claim of Gregory had appeared to be more serious and better founded than it was, the defendant could not justify the detention of the property from the owner after he was offered a bond of indemnity, satisfactory to himself, against such claim. And, further, I can hardly conceive of a case where the bailee would be justified in detaining property from the real owner, from May 15 to August 6, nearly three months, to inquire into the title. The defendant, by his conduct, identified himself with Gregory, and, unless the executions which were issued furnished him a defense, he must stand or fall by his title. His retention of the property so long after he was offered a complete indemnity, sat-

isfactory to himself, against the claims of Gregory, furnished a justification for the conclusion of the referee that he withheld the goods from the plaintiff in collusion with and for the benefit of Gregory.

If, however, the defendant was so embarrassed by the conflicting claims of plaintiff and Gregory, each claiming to own the goods and to be his bailor, that he could not, even with a bond of indemnity, safely or properly deliver the property to the plaintiff, he could have relieved himself from all responsibility by promptly commencing a suit in equity, in the nature of a bill of interpleader against the plaintiff and Gregory, and thus had the controversy and the right to the property judicially determined. Story's Eq. Jur., § 805, etc.; *Wilton v. Anderton*, 1 Barn. & Ald. 450; Redf. on Car., § 712.

Hence, it is quite clear that the defendant, prior to August 6, became liable to the plaintiff for a wrongful conversion of the property; and we will inquire whether any thing occurred afterward to relieve him to any extent from responsibility.

It is not claimed that the executions against Gregory alone in any way affected the rights of plaintiff; but the defense is based upon the execution against the plaintiff. Nothing was really done by virtue of the latter execution. The property was not sold upon it, and nothing was realized or applied upon it. The property was sold by virtue of the execution against Gregory as his property, and the proceeds applied upon it in satisfaction, *pro tanto*, of Gregory's debt. I do not, therefore, see how it can be claimed that the execution against the plaintiff in any way furnishes any defense. If the property had been sold under that execution, it would have been otherwise.

After a conversion of property, the title still remains in the owner, and the property can be taken from the wrong-doer upon an execution against the owner and sold, and the proceeds applied upon his debt, and the owner will thus have the benefit of the property; and in such case the wrong-doer can set up his seizure and sale, not as an entire defense, but in mitigation of damages, for the reason that it would be unjust for the owner to recover the value of the property after he has thus had the benefit of it. It is not the fact of the seizure that gives the defense, but that it has been seized under such circumstances that the owner has had, or could have, the benefit of it. But to protect the wrong-doer, as the law is settled in this State,

the seizure must be at the instance of a third person, and not at the instance of the wrong-doer, or upon process in his favor.

In *Hammer v. Wilsey*, 17 Wend. 91, it was held that after the defendant had wrongfully converted a horse, he could not show in mitigation of damages that he had seized and sold the horse upon process in his own favor. But in *Higgins v. Whitney*, 24 Wend. 379, the property had been tortiously taken by the defendant, and was afterward taken from him by process against the plaintiff in favor of a third party, and the court held that this could be shown in mitigation of damages upon the ground that, without any agency of the defendant, the property had, since the conversion by him, been taken from him by legal process, and applied to the plaintiff's use, by paying the debt which he owed to a third person. In *Sherry v. Schuyler*, 2 Hill, 204, a similar case, the court says: "The evidence offered (that the property had been taken from the wrong-doer upon process against the plaintiff, in favor of a third person) and rejected, was clearly admissible in mitigation of damages, as it would have gone to show that, independent of any agency on the part of the defendant, the property in question had been applied to the payment of the plaintiff's debt, due to a third person." In Connecticut, the courts hold, that the seizure and sale of the property after it has been converted upon process against the owner, can always be shown in mitigation of damages, even in cases where the process was in favor of the wrong-doer himself. In *Curtis v. Ward*, 20 Conn. 204, where it appeared in an action of trover brought by A, against B, that subsequently to the conversion complained of, B had attached the same goods in a suit against A, and having obtained judgment, levied his execution on such goods, and had them applied in satisfaction of his debt against A, all in due course of law, it was held that A could recover damages only for the original taking of the goods, and the detention of them until they were regularly attached. In this case the principle upon which such a defense in mitigation is allowed, is ably discussed in the opinion of the court. Judge WATTE says: "The plaintiff resists this claim, and insists that he is entitled to recover the value of the goods at the time of the conversion, with interest. This claim of the plaintiff would be well founded had he never, subsequent to the conversion, received any benefit from the property." "For it would be palpably unjust for the owner to recover the full value of his goods in their application to the payment of his debts, and then afterward recover that value

from another who has derived no substantial benefit from his property." While this case illustrates the principle upon which this defense in mitigation of damages is based, in allowing the defense to be based upon process in favor of the wrong-doer, it goes further than the cases in this State will warrant.

Hence, I am unable to see how the execution against the plaintiff furnishes any defense to this action. The property was seized and sold by virtue of the execution against Gregory. It matters not that the sheriff might have seized and sold the property as plaintiff's, or that he might have applied the proceeds of the sale upon the execution against the plaintiff. He did not do this. The owner of the execution against the plaintiff did not, so far as appears, claim or desire a sale upon his execution, and he did not claim to have the proceeds of the sale applied upon his execution.

The plaintiff lost and waived nothing by appearing at the sheriff's sale and objecting to the sale. The property remained his until he should receive in some way satisfaction for it (*Osterhout v. Roberts*, 8 Cow. 43), and he could claim it from and sue any person for it until he should procure satisfaction.

After the sale, the owner of the execution against the plaintiff did not claim the proceeds, but Harvey and Jaffray, the owners of the executions against Gregory, seem both to have claimed them, and the plaintiff interested himself to have the proceeds applied upon the Harvey execution instead of the other one. I do not see how this act of the plaintiff could affect his rights, so long as there was no proof or finding of the referee that he did any thing to prevent the application of the proceeds upon the execution against himself.

I have thus, by the application of plain principles of law to the facts of this case, reached a conclusion adverse to the defendant. While it may be hard for the defendant to be obliged to pay for this property, he has brought the hardship upon himself by his unnecessary interference with the property and rights of another, and he must abide the consequences of his own voluntary acts. The order of the general term must be reversed, and judgment upon the report of the referee affirmed with costs.

Judgment accordingly.

PARSONS *et al.* v. LOUCKS *et al.*, appellants.

(48 N. Y. 17.)

Statute of frauds—contract for manufacture of goods.

The statute of frauds applies to an oral contract for the sale of goods in existence at the time of making the contract, but not to an agreement to manufacture and deliver goods.

Defendant made an oral agreement to manufacture and deliver a quantity of paper to plaintiff. In an action for breach of the contract, *held*, that the agreement was valid, notwithstanding the statute of frauds.

ACTION for breach of an oral contract to manufacture and deliver a quantity of paper. The opinion sufficiently states the facts. The action was brought in the superior court of New York city, where plaintiff obtained judgment. The judgment was affirmed at general term, whereupon defendant further appealed to this court.

Augustus F. Smith, for appellants.

John E. Parsons, for respondents.

HUNT, C. The paper to be delivered was not in existence at the time of the making of the contract in October, 1862. It was yet to be brought into existence by the labor and the science of the defendants. Of the twenty thousand pounds to be delivered, not an ounce had then been manufactured. It was all of it to be created by the defendants, and at their mill. In such a case it is well settled that the statute of frauds does not apply to the contract. The distinction is between the sale of goods in existence at the time of making the contract, and an agreement to manufacture goods. The former is within the prohibition of the statute, and void unless it is in writing, or there has been a delivery of a portion of the goods sold, or a payment of the purchase price. The latter is not. The statute reads "every contract *for the sale* of any goods, chattels or things in action, for the price of fifty dollars or more, shall be void unless," etc. 2 R. S. 136, § 3. The statute alludes to a *sale* of goods, assuming that the articles are already in existence. This distinction was settled in this State in 1820, by the case of *Crookshank v. Burrell*, 18 Johns. 58,

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and has been followed and recognized in many others. *Sewell v. Fitch*, 8 Cow. 215; *Robertson v. Vaughan*, 5 Sandf. 1; *Bronson v. Wiman*, 10 Barb. 406; *Donovan v. Willson*, 26 id. 138; *Parker v. Schenck*, 28 id. 38; *Mead v. Case*, 33 id. 202; *Smith v. N. Y. Central R. R.*, 4 Keyes, 194.

The present is not one of the border cases, in which an embarrassing or doubtful question is presented, as where wheat is sold but the labor of threshing remains to be done (*Downs v. Ross*, 23 Wend. 270), or a sale of flour which has yet to be ground from the wheat (*Garbutt v. Watson*, 5 B. & Ald. 613), or the sale of wood or timber which requires to be cut and corded (*Smith v. N. Y. Central R. R.*, *supra*), nor where the defendants might procure other parties to manufacture the paper. 3 Pars. on Cont. 52. It was a simple, naked agreement to manufacture at their own mills, and deliver at a specified price, twenty thousand pounds of paper of specified sizes, no part of which was in existence at the time of making the contract. Indeed, there is no evidence that the rags and other materials from which it was to be manufactured were owned by the defendants, or were in existence, except so far as it may be argued that matter is indestructible, and that in some form they must necessarily have then existed. As to cases of this character, the course of decisions in this State has been uniform. If we desired to do otherwise, we have no choice; we must follow them.

The judgment must be affirmed with costs.

Judgment affirmed.

WELTS v. CONNECTICUT MUTUAL LIFE INSURANCE CO., appellant

46 N. Y. 34.)

Life insurance — "military service" — "casualties of war."

A policy of life insurance upon the life of W. contained a condition prohibiting the insured from going south of a specified degree of latitude, and from entering into any "military or naval service whatever." At the time of issuing the policy, the company, in consideration of a further premium, gave W. a written permission to go south of the specified degree of latitude for one year, provided that the "said W. was not insured by said

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policy against death from any of the casualties or consequences of war or rebellion, or from belligerent forces in any place where he may be." The insured, while engaged, within the year, in building a railroad bridge, under the direction of the United States military authorities, thirty miles in the rear of the Union army, was killed by a party of four men, not in uniform, who robbed the other laborers. *Held*, that the death of the insured did not occur while engaged in "military service," or from the "casualties of war or rebellion," within the meaning of the policy, and that the company was liable."

ACTION on a policy of life insurance, dated September, 1864, and issued by the Connecticut Mutual Life Insurance Company, upon the life of Philip J. Welts. The insured came to his death on the 31st of October, 1864, while engaged as superintendent of a party of laborers in building a bridge at Cedar Hill, Tennessee, under the direction of the United States military authorities. The place where he was so employed was about thirty miles north and in the rear of the Union army, and still further from the Confederate army. Welts was killed by a party of four men, who were not in uniform, but who robbed the laborers and residents. The conditions of the policy appear in the opinion. At the trial a verdict was directed for plaintiff. The verdict was sustained at general term, and defendants appealed to this court.

George T. Spencer, for appellant.

George B. Bradley, for respondents.

LEONARD, C. The policy enjoined it upon Welts that he was not to go south of the thirty-sixth degree of north latitude in the United States, and not to enter into any military or naval service whatsoever, without the consent of the company, indorsed in writing upon the policy, under the penalty of rendering the contract void. At the same time with the issuing of the policy, the company, for a further consideration, granted their written permission to go south of the line of latitude mentioned for the term of one year, and added to the consent, as a proviso or condition, that it was given with the understanding and agreement that Welts was not insured by the policy against death from any of the "casualties or consequences of war or rebellion, or from belligerent forces in any place where he may be."

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The permission which abrogates for one year the restriction against going south of the thirty-sixth degree of latitude at certain seasons, imposes a new limitation upon the liability of the company, in case of death from certain casualties or consequences of war, rebellion or belligerent forces, which were more to be apprehended in that part of the United States at the time the policy was issued, south of the thirty-sixth degree of latitude, and in the vicinity of that line, than the dangers from climatic causes. For the consideration of fifty dollars, the company took the hazard of the climate, and the assured took the risk of the casualties or consequences mentioned.

There is no evidence that the deceased availed himself of the permission to go south of the latitude mentioned; and, at the time of his death, he was clearly north of it, according to approved maps. If there was sufficient evidence, then, to go to the jury, tending to prove that the deceased entered the military service of the United States, or that his death happened from any of the casualties or consequences mentioned in the proviso attached to the written permission to go south, the direction to render a verdict for the plaintiff was erroneous, and the defendant's exception well taken.

The deceased held no office of a military character, and there is no evidence that he was ever enlisted or enrolled as a private. I am not much experienced in military affairs; but it is generally understood that there is a record of the entry of both officers and privates into the military service. There is clearly no evidence of this character.

There is some evidence that he, as well as the mechanics and laborers under his superintendence, were at work by the month. This does not indicate military obligation. The fact that he and the others were paid by the military paymaster proves nothing, on the question whether the deceased was in the military service. Such payment might be so made without having entered that service. His employment was not belligerent. On the contrary, the most decided non-resistant might consistently do the same work. It is urged that the railroads were under a military director, and were used for military purposes exclusively. The roads could not be so used until bridges were constructed; and I am unable to perceive that a civilian might not engage in their construction without losing his standing as a non-combatant. Suppose that the military director of railroads employed the deceased, and that he was subject

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to his authority while so employed; it does not necessarily follow that he had entered the military service. Entering the military service, within the meaning of the policy, must be taken in its strict or limited sense, as most advantageous to the assured, as well as all other provisions therein. The company frame the policy and choose the language. If there is any thing uncertain it is the right of the assured to enjoy the most favorable rule of construction. The general understanding of the term includes such persons only as are liable to do duty in the field as combatants.

There is no evidence that the widow is entitled to a pension, as would be the case if her husband had perished in the military service of the United States during the rebellion. There is, in my opinion, an entire absence of any evidence that the deceased was in any military service, according to the meaning of the policy. Did he lose his life by the casualties or consequences of war, rebellion, or from belligerent forces? Certainly there is no evidence that this party of four, who came without any of the insignia of war, armed with revolvers only, and doing nothing for the service of the public or Confederate cause, but confining their operations to robberies for their personal advantage, and to the murder of an unarmed man, not in the dress of a federal soldier, constituted a belligerent force, or any part of such force. The war or rebellion may be a remote cause of the death, as it was the cause of disorder and lawlessness; but the proximate cause is murder and highway robbery.

It would be a very unnatural and forced construction that would relieve the defendants from liability, by holding that the four robbers and assassins who murdered Philip J. Welts, and robbed the mechanics and laborers whose work he was superintending, were acting under the authority of the Confederate States. Had the defendants intended to attach such a meaning, the provision would have been directly for exemption from liability for death by violence. The language used can be considered as including only death from casualties or consequences of war or rebellion, carried on or waged by authority of some *de facto* government, at least. No evidence was produced tending to bring the defendant's case within any such limit.

There were no facts for the consideration of the jury.

The judgment should be affirmed, with costs.

Judgment affirmed.

BUHL V. PHILLIPS, executor, *et al.*, appellants.

(48 N. Y. 126.)

Insolvency—sale in fraud of creditors.

The sale upon credit, at a fair price, to a responsible vendee, of the entire effects of an insolvent copartnership, is not *per se* fraudulent as to creditors, although the vendee has knowledge of the insolvency. There is a distinction in this respect between a sale and an assignment. In the case of a sale there is a consideration passing to the vendor from the vendee, who becomes the owner of the property in his own right; and the vendor, while parting with the property, obtains the purchase-money, which, whether paid in cash or in notes, is liable to the claims of creditors and can be reached by an appropriate action. And although such a sale may be made, on the part of the vendor, with the intent to "hinder, delay, or defraud his creditors," the title of the vendee is not affected thereby, unless he had previous notice or knowledge of the fraudulent intention of the vendor.

A debtor, notwithstanding his insolvency, may make a preference, if *bona fide*, and a sale of property for that purpose is not invalid.

ACTION by the plaintiff, as judgment creditor of the defendants, Many & Lewis, partners in the jewelry business, to set aside a sale of all their property to John B. Phillips (also originally a defendant) on the ground that it was made with intent to hinder, delay and defraud plaintiff and other creditors of the firm of Many & Lewis. The facts sufficiently appear in the opinion. Judgment on report of a referee, in favor of defendants, was reversed at general term and new trial ordered. Defendants thereupon appealed to this court.

Marsh & Wallis, for appellants.

John J. Townsend, for respondent.

LOTT, C. C. The facts in this case did not warrant the reversal by the general term of the judgment entered on the report of the referee. It is a general rule that the verdict of a jury and the findings of a referee on questions of fact should not be set aside, if there is any testimony to sustain them, unless they are clearly against the weight of evidence. It is conceded, in the opinion of the presiding judge at the general term, that the special facts found by the referee were correctly found, and he stated that their correctness was not

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disputed by either party; but he came to the conclusion that they were "not competent in law to establish or warrant the finding that there was an absence of any fraudulent intent, but that, in his judgment, they established directly the contrary, for two reasons," which he states as follows: "1st. The sale was of the entire effects of an insolvent copartnership, upon a credit of from four to twenty-four months, the necessary effect of which was to postpone the payment of the creditors until the expiration of the term of credit, as well as to make the ultimate discharge of the copartnership debts dependent upon the pecuniary ability of the purchaser to pay the notes given by him as they respectively fell due, and was thus an act to hinder and delay creditors; and, 2d. Because there was an understanding between the parties, contemporaneously with the sale, that the purchaser was to pay individual debts of one of the copartners, to secure him in doing which, \$5,000 of the notes received upon the copartnership effects were handed back to him, to be appropriated by him in part in this way."

The first of those reasons was involved in the decision by the court of appeals of the case of *Loeschigk v. Bridge*, 42 N. Y. 421, and it was there held that the mere fact of a sale, by a party in failing circumstances, of his property, to a purchaser having a knowledge thereof, to an amount more than double of that sold in this case for his notes, payable at an average credit for sixteen months for the whole of the purchase-money, except \$1,000 paid in cash, does not *per se* establish fraud, or a fraudulent intent, to hinder, delay or defraud the creditors of the vendor.

The second reason is based on an error of fact. The understanding between the parties therein mentioned was not made contemporaneously with the sale, which took place on the 21st day of May, 1861, whereas, the said understanding was, as found by the referee, made on or subsequent to the 22d day of that month.

That finding is sustained by the testimony, and is conformable to the thirty-third item in the request of the plaintiff's counsel to find certain facts which he claimed to have been proved, and it is assumed to be correct by him in his points on this appeal.

The individual debts of one of the copartners, provided for by that understanding, amounted to \$214, and the notes for \$5,000, that were given back to Phillips for the purpose of securing him, were not only for that debt, but for several firm debts which he agreed to pay, and also as security for his indorsement of certain notes of the

firm for upward of \$1,500, which he had indorsed for their accommodation.

The conclusion of the learned judge that the transaction was fraudulent, for the two reasons above stated, was based on and resulted from his application of the principles of law applicable to assignments in trust for the benefit of creditors, prohibiting sales of the assigned property on credit, and the appropriation of partnership effects to the payment of individual debt of one of the partners, to the prejudice and loss of creditors of the firm. He said: "It can make no difference whether the sale of the whole of the effects of an insolvent copartnership upon credit, or the application of partnership effects to the payment of the individual debt of a partner, is accomplished by the creation of a trust, or by a direct sale to a purchaser, as in this instance. The effect in both cases is the same, to hinder and delay creditors, and what would be fraudulent in one form is equally so in the other." A material distinction between the two cases is overlooked. In the first case the transfer is voluntary and without consideration. Its effect is, moreover, to divest the assignor of all legal interest in and control over the proceeds of the assigned property, and the assignee, although vested with the legal title thereto, holds it subject to the trusts declared in the assignment, and no creditors, except those provided for therein, can claim any benefit therefrom, and their rights are fixed and regulated by the terms of the trust, and if they prescribe a sale on credit, the collection by the creditor of his claim is necessarily postponed until the expiration of the credit allowed. In the case of a sale, there is a consideration passing to the vendor from the purchaser, who becomes the owner in his own right of the property, and the vendor, while parting with the property, obtains the purchase-money therefor. This, whether paid in cash or in notes, is his property, and although it cannot in either case be reached by an execution, it is nevertheless liable to the claims of creditors, and can be reached by an appropriate action, or by the more summary proceedings supplementary to execution now authorized by the provisions of the Code.

If the avails are in notes or other securities, they can, under the order of the court, be converted into money, and be made immediately available in satisfaction of the debt sought to be collected.

There is, also, this material consideration, which has been overlooked as applicable to a sale. Although it may have been made on the part of the vendor with the intent to hinder, delay or defraud

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his creditors, yet that fact does not in any manner affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had a previous notice of the fraudulent intention of his vendor, or of the fraud rendering his title void.

The facts found by the referee show, among other things, that the transaction in question was an absolute sale, without any trust, express or implied, or any agreement at or previous to the sale as to the disposition of the proceeds, except so far as to provide that the debts due or agreed to be paid by Phillips, the purchaser, should be allowed in part payment of the purchase-money, and he was to be secured against liabilities for or on account of his indorsements. The consideration he agreed to pay was adequate, or, at all events, not so far under a liberal valuation as to raise any presumption of fraud on that account, and he was of sufficient means and responsibility to make the purchase, and the terms of credit appear to have been fixed so as to secure the payment of the notes he gave for the purchase-money when they fell due.

The amount of the notes was not sufficient to pay all the debts of the firm, and it was the object of Many, the member thereof who made the sale, to prefer certain of their creditors, including a copartnership of Many, Baldwin & Many, in the payment of debts due to them, and to indemnify them against liability on indorsements made for their accommodation. This object, although known to Phillips at the time of his purchase, did not render it fraudulent as against the plaintiff or any of the creditors who were not to be so preferred. A debtor, notwithstanding his insolvency, is allowed to make such preference, if *bona fide*, and a sale for that purpose is not invalid.

It appears that one of the debts which Many wished to secure was a note made or indorsed in the firm name of Many & Lewis for the private debt of Many himself, and indorsed by the said copartnership of Many, Baldwin & Many; but I infer, from what is stated relative thereto, that it was valid and obligatory on the firm, and properly chargeable against it. But if it was otherwise the fact cannot affect Phillips, the purchaser. It is not found by the referee, nor is it claimed that he had any knowledge or notice, at the time of his purchase, of the origin or consideration of that note, or the purpose for which it was given.

I will only add, that on a careful examination of the facts found by the referee (and they are presented by his findings as favorably

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to the plaintiffs as the testimony warranted), I am brought to the conclusion that there was no sufficient ground for the reversal by the general term of the judgment entered on his report, either on the ground of error upon the questions of fact or of law involved in the case.

It follows that the order of reversal should be reversed, and that the original judgment must be affirmed with costs of the appeals to the general term and to this court.

Judgment accordingly.

BREEZE, appellants, v. UNITED STATES TELEGRAPH CO.

(48 N. Y. 122.)

Telegraph company — condition in message as to repeating

Conditions in telegraphic messages as to repeating are reasonable; and where a person writes a dispatch and signs his name upon a blank containing a printed condition that the company will not be responsible for the correct transmission of a message unless it is repeated at an additional expense, he cannot recover for an error in transmission, the condition as to repeating not being complied with, and there being no allegation of gross negligence or willful misconduct on the part of the company. (*See note, p. 532.*)

ACTION to recover for an error in the transmission of a telegraphic message. The message was written and signed by G. W. Cuyler, president of the First National Bank of Palmyra, upon a blank form of defendants, containing the following provisions: "In order to guard against errors or delays in the transmission or delivery of messages, every message of importance ought to be repeated, by being sent back from the station to which it was directed to the station from which it was sent, and compared with the original message. Half the tariff price will be charged for this repeating and comparing. And it is hereby agreed between the signer or signers of this message and this company, that this company shall not be held responsible for errors or delays in the transmission or delivery of this message, if repeated, beyond the amount of fifty dollars, unless a special agreement for insurance be made and paid for at the time

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of sending the message, and the amount of risk specified in this agreement; and that in case this message is not repeated, this company shall not be held responsible for any error or delay in the transmission or delivery of same beyond the amount paid for transmission, unless specially insured, and the amount of risk paid for and specified in this agreement at the time, nor shall this company be held liable for errors in cipher, or obscure messages." . . . "Send the following message subject to the above conditions and agreement." The facts appear in the opinion. Judgment was rendered at general term for defendants, on a case agreed upon and submitted.

Plaintiffs appealed to this court.

Charles McLouth, for appellants.

G. P. Lowery, for respondent.

LOTT, C. C. The questions involved on this appeal do not, as stated by the appellants' counsel, "take a wide range," but are, by the facts detailed in the case, reduced to a narrow compass. It is therein stated that the defendants are a corporation, duly incorporated under the laws of the State of New York, and engaged in the business of transmitting messages and dispatches by electric telegraph, for hire, over a line of telegraphic wires owned by them, at their office in Palmyra, in this State; that they received and duly transmitted a dispatch or message, for and on behalf of the plaintiffs, to Camman & Co., of the city of New York, directing the purchase of "seven hundred (\$700) dollars in gold;" but, as the case states, by error of some of defendants' operators working between Palmyra and New York, the precise cause of which is unknown, it was received in New York, and sent and delivered to that firm, containing an order to buy "seven thousand dollars in gold." This dispatch or message was written by the plaintiffs' agent upon an ordinary blank of the defendants, containing certain provisions intended to limit their liability, particularly set forth in the statement of the case, and the principal question arises on the legal effect of those provisions.

It does not appear that the incorporation of the defendants is under a special act, and I shall assume, as the appellants' counsel states in his second point, that they are a corporation created under the general law (chapter 265 of the Laws of 1848) providing for the incorporation and regulation of telegraph companies, and the acts

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amendatory thereof. That act provides that any number of persons may associate for the purpose of constructing a line of wires of telegraph through this State, or from or to any point within this State, upon such terms and conditions and subject to the liabilities prescribed by the act; and it authorizes any association or corporation formed under it to "make such prudent rules, regulations and by-laws as may be necessary in the transaction of their business, not inconsistent with the laws of this State or of the United States." (§ 4.) And it is declared by section 11, as amended by chapter 559 of the Laws of 1855, that "it shall be the duty of the owner or the association, owning any telegraph line doing business within this State, to receive dispatches from and for other telegraph lines and associations, and from and for any individual, and, on payment of their usual charges for individuals for transmitting dispatches as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith, under the penalty of \$100 for every neglect or refusal so to do, to be recovered with costs of suit in the name of the person or persons sending, or desiring to send, such dispatch;" and the twelfth section declares it to be the further duty of every such owner or association to transmit all dispatches in the order in which they are received, under the like penalty of \$100, to be recovered with costs of suit by the person or persons whose dispatch is postponed out of its order as therein prescribed. There are provisions in both of these sections having no application to this case, and, therefore, unnecessary to be set forth. No other specific duty is imposed by the act on the associations organized under it than those prescribed and declared by the said eleventh and twelfth sections. They relate to their receipt and transmission of dispatches "on payment of their usual charges for individuals," and their right and power to fix those at such rates as they may deem proper, with a prohibition to demand more from other telegraph lines and associations than from individuals. There is no limitation or restriction on their power to make such prudential rules, regulations and by-laws as they may deem necessary in the transaction of their business, except only that they shall not be inconsistent with the laws of this State or of the United States.

Under that general power, the defendants were authorized to prescribe such regulations as they deemed necessary to guard against errors or delays in the transmission or delivery of messages, and to

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declare that a party who failed to comply therewith should assume all risks and losses resulting from such errors or delays.

In the exercise of that power, they, in their ordinary blanks on which the dispatches sent by them are written, after stating that "in order to guard against errors or delays in the transmission or delivery of messages, every message of importance ought to be repeated by being sent back from the station to which it is directed to the station from which it is sent, and compared with the original message," and that "half the tariff price will be charged for thus repeating and comparing," have inserted an agreement between the signer or signers of the message and the company, that the company shall not be responsible in case it is not so repeated for any such error or delay beyond the amount paid for transmission, unless specially insured and the amount of risk paid for and specified in the agreement at the time, which is followed by a direction or order immediately preceding the message to be sent, in the following terms: "Send the following message subject to the above conditions and agreements." The conditions are reasonable, and not against public policy; on the contrary, they subserve to carry out the objects for which telegraphic associations are created, and especially to secure the receipt of a message in the words in which it is written and delivered for transmission. A party using such a blank, and writing his dispatch thereon, assents to the terms and conditions on which it is to be sent. If he omits to read or to become informed of them, it is his own fault. A contract voluntarily signed and executed by a party, in the absence of misrepresentation or fraud, with full opportunity of information as to its contents, cannot be avoided on the ground of his negligence or omission to read it, or to avail himself of such information.

In this case there is no pretense of misrepresentation of fraud. It appears that the agent of the plaintiffs was the president of a bank at Palmyra, and that, as is stated in the case, "he had on hand at his office, which, to secure business, had been left there by the defendants, a lot of blanks like the one on which this message was written, and took the blank from among them to write this dispatch upon." After it was so written, it was taken by him to the office of the defendants, and presented to them for transmission to New York. Under this state of facts, the plaintiffs cannot be released from the legal obligation or effect of the contents of the instrument when perfected by the writing of the dispatch thereon, upon the

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admission in the case that "he or the plaintiffs had never read the printed part of it." The defendants had a right, from the agent's presentation of it, to assume and act on the assumption that he was fully informed of the provisions of the paper he had signed.

It is stated as a fact in the case, that the agent paid for the transmission of the message, but did not pay for or request to have the same repeated; but what was paid does not appear, and there was no insurance.

It follows, from the views above expressed, that the plaintiffs are precluded, by the express terms of their agreement, from recovering the amount claimed by them. It therefore becomes unnecessary to express any opinion on the question affecting the general power, duties and liability of the defendants, discussed with great care and ability by the learned counsel of the parties, or as to the validity of any of the other conditions or provisions, contained in the blank, but not applicable to this case.

It may be proper, however, to notice the point of the appellants' counsel, that the defendants cannot limit their liability in case of negligence; and in regard to it, I deem it sufficient to say that it does not appear as a fact in the case, nor is it, on what is stated, a conclusion of law, that the defendants or their agents were chargeable with negligence.

The statement in reference to it is, that the message was duly transmitted from the office at Palmyra, "but by error of some of defendants' operators, working between Palmyra and New York, the precise cause of which is unknown, it was received in New York" different from its original direction. The parties, by this admission, acknowledge and declare that the cause of the error is unknown; the court, therefore, cannot, in the face of this acknowledgment and declaration, say that it was attributable to negligence.

It follows, from the views above expressed, that the judgment appealed from must be affirmed with costs.

EARL, C. It is not very important to determine whether telegraph companies are common carriers or not, because I find no decision, entitled to any weight or authority, which holds that the common-law liability of carriers attaches to them. They may, in one sense, be called common carriers, as they are engaged in a public employment, and are bound to transmit, for all persons, messages delivered to them for that purpose. *Shearm. & Redf. on Neg.* 606.

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But if we call them common carriers in this sense, it does not follow that they become insurers, like the common carriers of goods. Shearm. & Redf. on Neg. 608; Redf. on Carr. 408.

The liability of telegraph companies is regulated by contract and the nature of their public employment. In the absence of any special contract limiting or regulating their liability, they do not insure the safe and accurate transmission of messages, but they are bound to transmit them with care and diligence adequate to the business which they undertake, and if they fail in such care and diligence, they become responsible. But, while they are bound to transmit all messages delivered to them, they have the right to make reasonable rules and regulations for the conduct of their business. They can thus limit their liability for mistake, not occasioned by gross negligence or willful misconduct, and this they can do by notice brought home to the sender of the message, or by special contract entered into with him. Redf. on Carr. 405; *McAndrew v. Electric Telegraph Co.*, 33 Eng. L. & Eq. 180; *Birney v. New York & Washington Tel. Co.*, 18 Md. 341; *N. Y. & Washington Printing Tel. Co. v. Drybury*, 35 Penn. 298; *Ellis v. American Tel. Co.*, 13 Allen, 226; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Wannan v. Western Union Tel. Co.*, 37 Mo. 472; *Camp v. Western Union Tel. Co.*, 1 Metc. 164.

Here Cuyler wrote the message upon a blank, which had been furnished by the company, specifying that the company would not be held responsible for any error in the transmission of the message, unless it was repeated. He had had the blanks in his possession for some time, and had had abundant opportunity to read them. The blanks contained the terms upon which the company solicited and would accept his business, and when the message was written upon one of them and brought to the office of the company, its agent had the right to assume and believe that he accepted the terms, and assented to and understood the agreement. In the absence of any proof that the blanks were printed in such small type, or otherwise, as to mislead, or that Cuyler was so illiterate that he could not read, he must be presumed to have understood the contents of the blank, and upon the ordinary principle applicable to the principle of *estoppel in pais*, he must be held estopped from denying or disputing the agreement. *Lewis v. Great Western Railway Co.*, 5 Hurl. & N. 867; *Grace v. Adams*, 100 Mass. 505; *Wolf v. Western Union Tel. Co.*, 62 Penn. 87. This would not be so if the blank had been delivered

to Cuyler at the time he wrote the message upon it, and he had no opportunity to read it, and to the knowledge of the telegraph operator had not read it. In such case there would have been no room for the application of the doctrine of estoppel, and no reason for indulging in presumptions.

We should reach the same conclusion if we held that defendant was a common carrier, with all the liabilities which attach to such carriers at common law; for it is well settled in this State that common carriers can contract for exemption from their common-law responsibility, as to every thing, certainly, except their gross negligence or willful misconduct. *Bissel v. N. Y. Cent. R. R.*, 25 N. Y. 442; *French v. Buffalo, N. Y. & Erie R. R. Co.*, 4 Keyes, 111.

I am, therefore, of the opinion that the judgment should be affirmed, with costs.

Judgment affirmed.

NOTE.—See *Sweetland v. Illinois, etc., Telegraph Co.*, 4 Am. R. 285; *Wolf v. Western Union Telegraph Co.*, id. 387; *Leonard v. The New York, etc., Telegraph Co.*, id. 446 and note; *Rittenhouse v. Telegraph Co.*, 4 id. 673; *Elwood v. The Western Union Telegraph Co.*, 6 id. 140; and *Baldwin v. The United States Telegraph Co.*, id. 166. For a general discussion of the subject, see Redfield on Railways, vol. 2, p. 310 (5th ed.) The supreme court of Illinois has recently decided in a case not yet reported, that a telegraph company cannot restrict its liability by a notice requiring the repetition of the message. — REP.

GAGER v. BABCOCK, appellant.

(48 N. Y. 154.)

Admiralty—liability of owner of vessel.

A vessel of which defendant, a resident of New York city, was the nominal owner, was libeled in Buffalo, while in charge of J. S., the master and real owner, for a penalty incurred by carrying passengers without license. J. S., without defendant's knowledge, procured plaintiff to become bail for her release; and on appeal from the decree enforcing the penalty, plaintiff became bail on the appeal bond, also. The decree was affirmed and paid by plaintiff, who brought action against defendant to recover the money so paid, claiming as surety in the appeal bond. *Held*, that as the vessel was libeled in a home port, and within communicating distance with defendant, J. S. had no right to bind him; also, that plaintiff must be deemed to have made the payment as defendant in the decree, and not as surety on the appeal bond.

Gager v. Babcock.

ACTION by Charles J. Gager against Dwight L. Babcock to recover the sum of \$675, alleged to have been paid by plaintiff as surety upon an appeal bond executed for defendant's benefit. It appeared that one Adams was the owner of a steam-tug, which he induced defendant, who was a resident of New York city, to take the title to, defendant not paying, or agreeing to pay, any thing for her, and Adams continuing to run her as master and receiving all her earnings. The tug was subsequently libeled at Buffalo, in the United States district court, for a penalty incurred by carrying passengers without inspection and license, under the act of congress of July 7, 1838. Adams, without consultation or communication with defendant, procured plaintiff and one Kennedy to become bail for her release, Adams appearing in the suit in the name of defendant. Judgment for the penalty was rendered against the sureties, with costs and expenses. Adams then appealed in plaintiff's name to the United States circuit court, and plaintiff and one Hebard became sureties on the appeal bond. The decree of the district court was affirmed, execution was issued, and plaintiff paid the amount thereof, for which this action was brought, basing his claim as surety on the appeal bond. Judgment for plaintiff was affirmed at general term. Defendant appealed to this court.

A. P. Lansing, for appellant.

George B. Hibbard, for respondent.

EARL, C. The defendant was the mere nominal owner of the vessel; and as between him and Adams, the latter appears to have been the beneficial owner, controlling the vessel and receiving her entire earnings. At the time of the seizure of the vessel, the plaintiff also owned a vessel, which was seized for a similar offense, and he proposed to Adams that if he would procure a surety for him, he, plaintiff, would sign for him, Adams. Adams then did procure a surety for him, and he signed for Adams. Such is the evidence, and the court might well have inferred that the plaintiff signed the bond for Adams' benefit upon his credit, and not upon the credit of the defendant as the legal owner of the vessel.

The plaintiff, in his complaint, does not base his right to recover upon the first bond, which he executed to release the vessel from the marshal, and he does, not, in his complaint, even allude to or men-

tion that bond, and he does not mention the fact that he ever incurred any liability on account of that bond, or that any judgment or decree had been rendered against him as surety in such bond. He bases his right to recover entirely upon the bond given upon the appeal, and the payment of money by him as surety in such bond. It does not appear, however, that he ever paid a dollar as surety on the appeal bond. As I understand it, the proceeding in the district court was one *in rem* against the vessel, and after the bond was given to release the vessel the bond took the place of the vessel, and the decree in that court was not one which could be enforced *in personam*, against the defendant as owner, because he did not sign the bond, but it was a decree *in personam* against the sureties, which could be enforced against them by execution. This decree was upon the appeal affirmed in the circuit court, and a decree of affirmance was entered in that court. Execution was issued upon this last decree against the plaintiff, and he paid it, and for such payment he brought this action. He made the payment as defendant in the decree and execution, and not as surety upon the appeal bond. He would have been equally obliged to pay the execution if the bond had been signed by some one else, and he had not signed it. Hence, I am unable to see how this action, based upon a claim for money paid by plaintiff as surety upon the appeal bond, can be maintained. But further, the appeal bond was not conditioned to pay the damages as well as costs and expenses, but simply to pay "the costs and expenses" awarded against him upon the appeal. Here there was no proof of the amount of the costs and expenses upon the appeal, and if the plaintiff had been prosecuted upon the appeal bond, I do not see how he could have been made liable for the amount of the decree appealed from, as well as the costs and expenses.

Hence, without going further, we find abundant reason for reversing the judgment appealed from. But if we so far assent to plaintiff's claim as to hold that he, as surety in the appeal bond, was liable to pay the whole amount of the decree in the circuit court, and that he did pay it as such surety, the result must be the same.

We will assume, as we must, that the defendant was the legal owner of the vessel, and that he permitted himself to be held out to the world as such by Adams, the master. He resided in the city of New York, and Buffalo, in the same State, was the home port of the vessel in which she was seized. At the time the appeal bond was given, the vessel was in no peril. She had been released and restored

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to the master. Under such circumstances, Adams had no authority, as master, to prosecute an appeal, or to give the appeal bond. It is not necessary to determine what authority he would have had in a foreign port, because masters have greater authority in a foreign than they do in a home port. He was in the home port, near the residence of the owner, and could have communicated with him. A master, in a case of extreme necessity, has authority to sell the cargo. But in *Bryant v. Commonwealth Ins Co.*, 13 Pick. 543, where a vessel was stranded on the coast of Virginia, and the cargo was landed without damage, and was not of a perishable nature, and might have been kept in reasonable safety until the owners and insurers, who lived in Massachusetts, could be heard from, it was held that the master had no authority to sell the cargo, and break up the voyage, without waiting until the owners and insurers could be consulted. Mr. Justice PUTNAM, in delivering the opinion of the court, says: "It would be clear that, if the master assumed to act for the owners and underwriters, when they were present, or so near as to be consulted in regard to the disposition of the property, his acts, under such assumption of authority, would not bind them." The master is the agent of the owner, appointed by him, and is authorized to act for him in all matters which are fairly embraced within the scope of his appointment. He has the control and management of the vessel, and can hire and discharge seamen, can, ordinarily, purchase supplies and procure repairs upon the credit of the owner, and, in case of any emergency, in the absence of the owner, do whatever is necessary to save the vessel or to prosecute his voyage. But when the owner is himself present, or within easy access, that agency of the master, which is founded on necessity, disappears, for the necessity has ceased to exist. 1 Pars. on Mar. Law, 380. The contracts which he is authorized to make must relate to the condition or the use and employment of the ship. Here the owner was within easy access, and the appeal and giving of the bond had no relation whatever to the condition or use or employment of the vessel. All peril to the vessel had passed. In *Belden v. Campbell*, 6 Eng. L. & Eq. 473, it was held that the master had no authority to borrow money to pay for work already done; and, therefore, where the ship, bound for Newcastle, was towed into that port, no agreement having been previously made that the towage was to be paid for immediately, and the master, six days afterward, borrowed money to pay for the towage, it was held that the owner was not liable. Here the bond was given long after the liability, if any, of

the owner had been incurred. To test it, could the master have borrowed money of the plaintiff, upon the credit of the owner, to pay the decree? I think not. And if he could not do this, how could he bind the owner by procuring the plaintiff, in any way, to become surety for the payment of the decree? Hence I conclude that within principles of law, that admit of no dispute, the master had no authority to bind the owner to the plaintiff, by the contract of indemnity, implied by his becoming surety upon the appeal.

But it seems to be claimed, on behalf of the plaintiff, that, admitting all this, inasmuch as the defendant was bound by the decrees of the district and circuit courts, and could not impeach them, he is, irrespective of the authority of the master, bound to the plaintiff, who became his surety upon the appeal. The master appeared for the defendant in those courts, and procured an attorney to appear for him; and it may be that he is so far bound by the decrees pronounced against him, that he cannot attack or impeach them collaterally. *Brown v. Nichols*, 42 N. Y. 26. An unauthorized attorney may appear in an action for a party, and the party may be bound by the judgment pronounced against him; but yet he may not be bound by all the attorney may assume to do for him. If the unauthorized attorney should procure some one to pay or become security for the judgment, he could not bind the party. And suppose he should commence a suit and procure an attachment or order of arrest to be issued, and procure some one to sign as surety an undertaking, would it be claimed that he could thus place the party for whom he acted without authority under any obligations to the surety? And yet the party might be bound by the judgment. A person who becomes surety for a party in a legal proceeding must see to it that he becomes such upon the request of the party himself, or his attorney or agent duly authorized to act for him.

The plaintiff's case is not strengthened any by the fact that the plaintiff signed the first bond, and became liable thereon, because he has not in any way based his right of action upon that bond, and I will not, therefore, inquire whether the defendant was bound to indemnify him as surety upon that bond. But it may well be doubted whether he was, as the vessel was in her home port, and the owner within easy access, where he could have been consulted.

The judgment of the circuit and general term must be reversed and new trial granted; costs to abide event.

LEONARD, C., delivered a concurring opinion.

Judgment reversed.

Hoffman v. Armstrong.

HOFFMAN v. ARMSTRONG, appellant.

(48 N. Y. 201.)

Real estate — adjoining proprietors — overhanging trees.

The owner of land overhung by the branches of a fruit tree, standing wholly on the land of an adjoining owner, is not entitled to any of the fruit growing thereon.

ACTION of assault and battery brought by Sarah M. Hoffman against Abner A. Armstrong. It appeared that defendant and one Dr. Hoffman were adjoining proprietors of lands; a cherry tree stood on the land of Dr. Hoffman, but its branches projected over defendant's land. The sister of Dr. Hoffman, who lived with him, got upon the line fence and undertook to pick cherries on the overhanging branches, when defendant forbade her, and, she not desisting, he committed the assault and battery complained of. The court charged that "every person, upon whose lands a tree stands, owns the whole of that tree, notwithstanding portions of it may overhang the lands of another, and, . . . if the defendant attempted to prevent the plaintiff from picking the fruit by violence, he was a wrong-doer, and this action lies against him, . . . and your verdict should be for plaintiff." There was a verdict for plaintiff. Judgment thereon was affirmed at general term. Defendant appealed to this court.

Amasa J. Parker, for appellant. The defendant was the owner of the fruit which was growing on the branches of the tree, and which overhung his land. He owned every thing above as well as every thing below his land. 2 Bl. 18; 3 Kent's Comm. 401, § 52; Broom's Legal Maxims, 289, 292, 382, ed. '68; *Norris v. Baker*, 1 Rol. 393; *Lodie v. Arnold*, 2 Salk. 458; 3 Stephen's Com. 500; *Holden v. Coats*, 1 M. & M. 112; *Waterman v. Tooper*, 1 Ld. Raym. 737; *Griffin v. Bizby*, 12 N. H. 454; *Lyman v. Hale*, 11 Com. 177; *Masters v. Pollie*, 2 Rol. 141; Crabbe on Real Property, § 96; 2 Bouv. Inst. 158, 1570, 1576. Being such owner, he was authorized to protect it. 38 Vt. 117.

H. V. Howland, for respondent. The cherry tree, with its fruit, was the property of Dr. Hoffman. Plaintiff was not a trespasser,
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therefore. 34 Barb. 547; *Masters v. Pollie*, 2 Rol. 141, 255; *Topper v. Waterman*, 1 Ld. Raym. 737; 1 M. & M. 112; 7 Kinne's Law Comp. 252; 12 N. H. 457; 11 Conn. 177; 1 Hilliard on Real Property, 10; 9 Barb. 655; 25 N. Y. 123.

LORT, C. C. The only material question presented in this case is, whether the owner of land overhung by the branches of a fruit tree standing wholly on the land of an adjoining owner is entitled to the fruit growing thereon.

The defendant claims that the ownership of land includes every thing above the surface, and bases his claim on the maxim of the law "*Cujus est solum ejus est usque ad cælum*," and that, consequently, he was the owner of the overhanging branches and the fruit thereon. The general rule unquestionably is, that land hath, in its legal signification, an indefinite extent upward, including every thing terrestrial, not only the ground or soil, but every thing which is attached to the earth, whether by the course of nature, as trees, herbage and water, or by the hands of man, as houses and other buildings. See Co. Litt. 4 a; 2 Black. Comm. 18; 3 Kent's Comm., p. 401; 2 Bouv. Inst., § 1570.

This rule, while it entitles the owner of the land to the right to it, and to the exclusive use and enjoyment of all the space above it, and to erect any superstructure thereon that he may see fit — and no one can lawfully obstruct it to his prejudice — yet, if an adjoining owner should build his house so as to overhang it, such an encroachment would not give the owner of the land the legal title to the part so overhanging. It would be a violation of his right, for which the law would afford an adequate remedy, but would not give him an ownership or right to the possession thereof. *Aiken v. Benedict*, 39 Barb. 400.

Although different opinions have been held as to the rights of owners of adjoining land in trees planted, the bodies of which are wholly upon that of one, while the roots extend and grow into that of the other, and derive nourishment therefrom, it was considered by ALLEN, J., in giving the opinion of the court in *Dubois v. Beaver*, 25 N. Y. 123, etc., that the tree is wholly the property of him upon whose land the trunk stands. This principle is sustained in *Masters v. Pollie*, 2 Rol. 141; *Holder v. Coates*, 1 M. & M. 112; 22 E. C. L. 264.

The ground or reason assigned in those cases for holding that the

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owner of land on which no part of a tree stands, but into which the roots extend, has any interest, is that the tree derives its nourishment from both estates, and not the ground or maxim on which the defendant's claim is based.

We have not been referred to any case showing that where no part of a tree stood on the land of a party, and it did not receive any nourishment therefrom, that he had any right therein, and it is laid down in Bouvier's Institutes (section 1573), that if the branches of a tree only overshadow the adjoining land, and the roots do not enter into it, the tree wholly belongs to the estate where the roots grow. See, also, *Masters v. Pollie*, 2 Rol. 141; *Waterman v. Toper*, 1 Id. Raym. 737.

The rule or maxim giving the right of ownership to every thing above the surface to the owner of the soil has full effect, without extending it to any thing entirely disconnected with or detached from the soil itself.

It follows, from the views above expressed, that the ruling of the judge at the circuit was right, and the judgment appealed from must be affirmed, with costs.

Judgment affirmed.

RYAN V. WARD *et al.*, appellants.

(48 N. Y. 204.)

Receipt in full — effect of.

Under a contract for the delivery of hides, plaintiff was to receive a *bonus* on each hide delivered. At each delivery defendant paid the value of the hides, and received a receipt from plaintiff expressed to be *in full*. The *bonus* was not paid. *Held*, that plaintiff could recover the *bonus*, notwithstanding the receipts.

ACTION to recover a balance due by defendant to plaintiff, on a contract for the delivery of hides. Under the contract defendant was to give plaintiff a *bonus* on each hide delivered. At the several deliveries payments of the value of the hides were made, and plaintiff gave receipts expressed to be *in full*. But the *bonus* was not

paid. Judgment was rendered in favor of plaintiff, which was affirmed at general term; and defendant appealed to this court.

Samuel Hand, for appellants.

John M. Scribner, Jr., for respondent.

HUNT, C. The facts are all found in favor of the plaintiff. They are sustained by competent evidence, and the judgment has been affirmed by the general term. We can make no inquiry into the facts, but must take them as given by the referee in his report.

There is but a single question of law in the case. During the delivery of the hides payments for them were usually made weekly. On several of these occasions receipts were given for the precise amounts paid, which were expressed to be in full for the hides. In fact, the payment was not in full, but a further sum was then due. This was known to the plaintiff. There was no error, and there was no fraud. Is the plaintiff cut off by these receipts from now recovering the balance actually due to him?

By the finding of the referee this amount now sought to be recovered was, and is, actually due to the plaintiff. How has the debt been discharged? Not by payment; not in a settlement, by way of compromise, of disputed accounts. No such transaction took place. There was no dispute between the parties. Neither was asked at any time to yield any thing claimed on his part. Neither party understood that there was any such concession. There was due to the plaintiff a sum, certain — say \$2,000, as an illustration. The defendants pay \$1,500, and the plaintiff gives them a receipt in full for \$2,000. If A lends B \$2,000, and B pays A \$1,500, which A says, either orally or by writing, is in full of the loan, it, nevertheless, is not in full. A may at once sue B and recover the remaining \$500. There is no consideration for the professed discharge. A man cannot, by the payment of \$1,500, pay an admitted debt of \$2,000. This has ever been the law. In such case nothing less than a technical release, under seal, can bar the recovery. *Harrison v. Close*, 2 Johns. 447; *Seymour v. Minturn*, 17 id. 169; *Mech. Bk. v. Hazard*, 13 id. 353.

I can see no difference, in this respect, between an admitted debt created by the sale of property and an admitted debt created upon the loan of money. They stand upon the same plane. Neither can

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be satisfied by part payment. *Hendrickson v. Beens*, 6 Bosw. 639; 1 Greenl. Ev., § 212; authorities, *supra*.

The cases in which a receipt has been held to be conclusive upon the party giving it will be found to be cases where the claims or accounts were in dispute, and a compromise was agreed upon, or where a receipt was given for unliquidated damages. Such were the cases of *Coon v. Knappe*, 4 Seld. 402, and *Kellogg v. Richards*, 14 Wend. 116, cited by the appellant. The first case was where an injury was occasioned by the upsetting of a stage coach. The plaintiff gave a receipt for forty dollars "in full for damages done to me by the stage accident of the 13th of June." This was held to be in the nature of a contract and release, and that it could not be varied by parol proof. It has no resemblance to the case before us. *Kellogg v. Richards* was a case where the creditor received the note of a third person for a less sum than that due to him, and in full payment of his debt. In such case the security of a third person forms a consideration for the discharge of the residue of the debt. It is binding as an accord and satisfaction. *Boyd v. Hitchcock*, 20 Johns. 76; *LePage v. McCrea*, 1 Wend. 164.

In my opinion, the judgment of the general term was correct, and should be affirmed.

Judgment affirmed.

SWARTHOUT v. NEW JERSEY STEAMBOAT Co., appellant.

(48 N. Y. 202.)

Common carrier by water — effect of inspection of boilers, etc., on liability.

The inspection of the boilers, etc., of a vessel employed in the carriage of passengers, and the certificate of the inspector showing that they answer the requirements of the acts of congress of July 7, 1838, and August 30, 1852, do not *per se* constitute a defense to an action for an injury to a passenger. The acts of congress do not impair the common-law right of action by persons thus injured through the unskillfulness or negligence of the owner or master of a vessel.

ACTION to recover damages sustained by plaintiff while a passenger on defendant's vessel, employed in the carriage of passengers between New York and Albany. The opinion states the questions considered with sufficient clearness. Judgment was rendered in

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favor of plaintiff, which was affirmed at general term. Defendants appealed to this court.

Charles Jones, for appellant.

M. I. Townsend, for respondent.

GRAY, C. Two questions are presented by the bill of exceptions for our consideration. One is, whether an inspection of the vessel, upon which the injury complained of occurred, her boilers, including her entire steaming apparatus, by the proper officer for that purpose, showing, as the inspector believed and certified, that they came fully up to the requirements of the act of congress of July 7, 1838, and the act amendatory of the same, passed August 30, 1852, constituted of itself a defense to this action. The only object of legislation by congress on this subject was to secure to the passengers upon steam vessels greater security against disaster.

The testimony of the inspector, whether as a witness upon the stand or by his official certificate, is not made conclusive; evidence upon the same subject, borne by persons of equal character and skill, is to be taken and considered upon its merits. Congress has not professed to take away or impair the common-law right of action by persons thus injured through the unskillfulness or negligence of the owner or master of a vessel. The act itself provides that, if the injury happens not only through any neglect to comply with its provisions, but through known defects of the steaming apparatus, the master and owner, as well as the vessel itself, shall be liable. It was fairly inferable from the evidence that injury occurred through a known defect of the steaming apparatus. It was proven by witnesses on the part of the plaintiff that the escape of the steam was caused by an improper construction or fastening of the part of the boiler that gave way, and that a better and more improved mode of constructing the boiler had been in use for years, which, if it had been adopted, would have saved the injury. The only other question arises upon the instruction given to the jury, that the plaintiff was entitled to recover what, in their judgment, he should receive for his bodily sufferings. In this there was no error; the ruling rests upon authority. *Ransom v. The N. Y. & E. R. R. Co.*, 15 N. Y. 415; *Curtis v. The Rochester & Syracuse R. R. Co.*, 18 id. 541. The judgment should be affirmed.

Judgment affirmed.

RAWSON v. The Pennsylvania Railroad Co.

RAWSON v. THE PENNSYLVANIA RAILROAD Co., appellant.

(48 N. Y. 212.)

Common carrier — limitation of baggage. Married woman — right to sue.

A married woman may sue in her own name, under the statutes of New York for injuries to her paraphernalia, given to her by her husband.
A railroad passenger is not bound by a printed notice in his ticket, limiting the weight and value of his baggage, unless his attention is called to the notice, by the ticket agent, or unless he is aware of it when the ticket is purchased, in which case he will be presumed to have assented to the terms of the notice, in the absence of any objection on his part.

ACTION by Dorothea Rawson, a married woman, to recover the value of baggage lost on defendants' railroad, in September, 1864. Plaintiff purchased a ticket at Massillon, Ohio, for New York city, the ticket having the following printed notice on its face: "This ticket entitles the holder to not over eighty pounds baggage free, and not at rate exceeding in value \$100, unless notice is given, and an extra amount paid, at double first-class freight rates. No road represented by either of these tickets is responsible for the passenger or baggage while upon any other road."

(Signed)

"H. R. PAYSON,
"General Passenger Agent."

The baggage consisted of two trunks, the contents of which were valued at \$3,847. Part of the contents had been given plaintiff by her husband, and part by her son. Nothing was paid for extra baggage. An accident occurred near Thomaston, on the Pennsylvania Railroad, and the trunks were destroyed. At the trial, a verdict was rendered in favor of plaintiff for the full value of the baggage. The judgment thereon was affirmed at general term, whereupon defendants appealed to this court.

A. J. Vanderpoel, for appellant.

D. M. Porter, for respondent.

EARL, C. The first question to be considered is, whether the property destroyed belonged to the plaintiff in such a sense that she

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can maintain this action. It consisted of her wearing apparel and personal ornaments, and constituted her paraphernalia. A portion of them was given to her by her husband, and as to such portion it is claimed she had no such property as will sustain a recovery in her name. At common law, the wife's paraphernalia during coverture ordinarily belonged to the husband, and he could dispose of them; but he could not dispose of them by will; and if the wife survived him, she could claim them against all persons, except the husband's creditors. And this common-law rule is substantially embodied in our statutes, except that the wife's paraphernalia are secured to her even as against creditors. 2 R. S., 84, §§ 9 and 10; 1 Williams on Executors, 644; Willard's Executors, 251; Reeves' Dom. Rel. 37.

For an injury to or conversion of the wife's paraphernalia during coverture, the husband was, at common law, the proper party to sue, and this rule has not been changed by our statutes, except so far as the wife can, in any case, claim the paraphernalia as her separate property.

This property was given to the wife by her husband and her son. As to so much as was given to her by her son, no question is made; but it is claimed that the gift of her husband to her was invalid, and hence that the property remained his. Prior to the recent legislation in this State in reference to the rights of married women, gifts of personal property from husband to wife would be upheld in equity, though void at common law, and such gifts could be impeached only by creditors. *Graham v. Londonderry*, 3 Atk. 393; *Deming v. Williams*, 26 Conn. 226; *Borst v. Spelman*, 4 N. Y. 284; *Neufville v. Thomson*, 3 Edw. Ch. 92; *Mews v. Mews*, 21 Eng. L. & Eq. 556; Reeves' Dom. Rel. (3d ed.) 170, note 1. In equity the property given would be treated as the wife's separate estate, and she would be protected in its enjoyment and possession, even against the interference of her husband. This estate, under the statutes of 1848, 1849, 1860 and 1862, in reference to the property of married women, if not absolutely converted into a legal estate, is clothed with all the incidents of a legal estate, and she is the proper person to sue and to be sued in reference thereto. Hence, I cannot doubt that this action was properly brought in the name of the plaintiff.

The only other question to be considered is, whether the matter printed upon the face of the railroad ticket, bought by the plaintiff at Massillon, limited the liability of the defendant; and that it did not, is now too well settled to admit of dispute. *Blossom v. Dodd*,

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43 N. Y. 264. The words thus printed do not purport to embody the contract between the parties. They are a mere notice as to the terms upon which a passenger's baggage will be carried, and are entitled to no more force because they are printed upon the face of the ticket than if they had been printed on the back of the ticket, or on a separate piece of paper posted up at the ticket office; and hence this case is clearly within the rule that a carrier cannot limit his liability by notice, but can do so only by express contract.

It must, however, be admitted that if the railroad agent had called plaintiff's attention to this language, when he sold the ticket and took her money, or if it had been shown that she knew of this language when she paid her money and took the ticket, the law would presume, in the absence of objection on her part, that she assented to the terms therein expressed. But here she testified that she did not read this language, and there is no proof that she received the ticket under such circumstances that the law will presume that she must have known and understood the language, and assented to the terms. It would be unreasonable to presume that a passenger, when he buys a railroad ticket at a ticket office, stops to read the language printed upon it, and it would be equally unreasonable to hold that a passenger must take notice that the language upon his ticket contains any contract, or in any way limits the carrier's common-law liability.

A ticket does not generally contain any contract, and is not intended to. It is a mere token or voucher adopted for convenience to show that the passenger has paid his fare from one place to another.

The contract between these parties was made when the plaintiff bought her ticket, and the rights and duties of the parties were then determined. Hence, even if the plaintiff had read what appears upon her ticket after she had entered upon her journey, it would have made no difference with her rights. She was not then obliged to submit to a contract which she never made, or leave the train and demand her baggage.

I have, therefore, reached the conclusion that the judgment should be affirmed, with costs.

Judgment affirmed.

BUNGE *et al.* v. KOOP *et al.*, appellants.

(48 N. Y. 225.)

Contract — compromise of undisputed claim — consideration.

Defendants being unable to pay an undisputed liability of \$6,400, which they had incurred by breach of a contract with plaintiff, it was agreed that if defendants would borrow of their friends and pay \$3,500, and agree to pay an additional sum as soon as they were able, up to seventy-five cents on the dollar, plaintiff would compromise his claim. Defendants borrowed and paid the \$3,500, mainly in checks of their friends. *Held*, that this did not preclude plaintiff from suing for the residue of the claim, there being no consideration for the compromise.

ACTION to recover damages for breach of a contract made May 13, 1864, whereby defendants were to deliver to plaintiffs, "at seller's option, on or before the 31st day of July, 1864, exchange for 10,000 Louis d'or thalers, lawful money of Bremen, at sixty days' sight, for the price of \$1.30, lawful money of the United States, for each Louis d'or thaler." The plaintiffs claimed \$6,400 damages, but admit the payment of \$3,500. The answer alleged, in brief, that, under the contract set forth, the plaintiffs claimed, on the 30th of July, 1864, the payment of \$6,400; that the defendants were unable to pay the same; that it was then agreed that if the defendants would induce their friends to raise and loan to them the sum of \$3,500, and the defendants should pay the same to the plaintiffs, the plaintiffs would compromise their alleged demand upon receiving that sum, leaving it to defendant's honor to pay an additional sum, which, together with the \$3,500, should make seventy-five cents on the dollar, to be paid when the plaintiffs should be able; that, in pursuance of this agreement, the defendants borrowed of their friends and paid to plaintiffs \$3,500. At the trial, the evidence showed that \$3,000 was borrowed of defendant's friends in checks, and these, with \$500 of their own money, constituted the \$3,500 paid. Defendants claimed that the alleged arrangement and compromise constituted a defense to the action, but a verdict was directed for plaintiffs, and defendants excepted. A new trial was denied at general term, and judgment on the verdict was entered, from which defendants appealed to this court.

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J. M. Van Cott, for appellants.

Weeks & Foster, for respondent.

EARL, C. The defendants, under their contract, could perform by delivering the exchange on or before July 31, 1864. It so happened that the 31st day of July was Sunday. It is not important in this action to determine which was the last day upon which the defendants could tender performance — whether they could do it upon Sunday or Monday, or whether they were bound to do it upon Saturday. On the 28th or 29th of July, the defendants informed the plaintiffs that they could not perform, and this dispensed with any offer of performance by the plaintiffs on the 31st, or any other day. *Crist v. Armour*, 34 Barb. 378.

On the 28th day of July, the defendants informed the plaintiffs that they would not be able to deliver the exchange, and they then entered into negotiation with the plaintiffs for a compromise of the damages, and finally, as there was evidence tending to show, the arrangement set up in the answer was concluded, and on Saturday they paid the \$3,500, agreeing to pay the balance, up to seventy-five cents on the dollar, when they should become able.

There was no consideration for the alleged agreement. In paying the \$3,500, the defendants did no more than they were bound to do. The \$3,500 was only a portion of the whole sum which they were liable to pay, and its payment could not, therefore, furnish a consideration for the agreement to take less than the balance due, or for extending time for the payment of such balance. *Harrison v. Close*, 2 Johns. 448; *Dedrick v. Leman*, 9 id. 333; *Palmerton v. Huxford*, 4 Denio.

This was not the settlement of a disputed or doubtful claim. It is not so alleged in the answer. The answer assumed, and the parties in all stages of their negotiations assented, that the plaintiff's claim for damages was \$6,400; and the undisputed evidence upon the trial showed that it was so much. Hence the compromise could not be upheld as the settlement of a disputed or uncertain claim. Neither was the \$3,500 paid in advance, so as thus to furnish a consideration for the agreement. Such a consideration was not thought of by the parties, and was not claimed in the answer, nor upon the trial. The defendants had the option to fix the day of performance at any time before the 31st day of July, and they fixed it for

all purposes on the 29th or 30th of July, and treated the contract as ended, and their liability to damages as fixed and certain.

The defendants alleged in their answer, and gave evidence tending to show, that it was the agreement that the compromise and extension should be effected, if they could induce their friends to raise for and loan to them the \$3,500. They proved on the trial that to enable them to make the compromise, their friends loaned them \$3,000, and that, with \$500 of their own money, they paid the \$3,500 to the plaintiffs.

This agreement to thus get the money from their friends was chiefly relied upon by the defendants in their answer and upon the trial as furnishing the new consideration for the compromise. I cannot assent to this claim. The money, when paid, was to belong, and, in fact, did belong, to the defendants. It was to be paid, and was paid, as their money. Suppose a debtor agreed to go to work and earn the money, or to dig for it in the earth, would this furnish a new consideration to uphold an agreement of the creditor to take less than his conceded due? In all cases, an embarrassed debtor must make some effort to procure the money to make a compromise, but no case can be found holding that the fact that he had agreed to make such effort furnishes any consideration to uphold the compromise. The debtor is legally bound to pay, and it is utterly indifferent to the creditor where he gets the means to do it; that is the matter of the debtor, and all his efforts are expended in simply endeavoring to discharge a legal obligation. Hence, the fact that the defendants agreed to induce their friends to loan them the money, and that they did induce them to loan it, furnishes no new consideration to uphold the compromise.

It matters not that the \$3,000 which the defendants received from their friends was in checks, which they handed over to the plaintiffs. If the plaintiffs had agreed to receive the notes of a third party, or any specific personal property, in payment and satisfaction of their claim, it would have been fully paid and satisfied, no matter how small the value of the note or property was. But here the agreement, as alleged in the answer, and proved, was that the defendants should pay the \$3,500 in money, and this they undertook to do in the checks; they were paid and received as money.

I have, therefore, reached the conclusion, upon the whole case, that the facts, as claimed by the defendants, do not constitute a defense to the balance claimed by the plaintiff, either as constituting pay-

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ment or an accord and satisfaction, and the judgment must be affirmed, with costs.

HUNT, J., delivered a concurring opinion.

Judgment affirmed.

THE MERIDEN BRITANNIA CO. V. ZINGSEN, appellant.

(48 N. Y. 241.)

Statute of frauds—promise to pay the debt of another. Double contracts—condition precedent.

It was orally agreed among three parties — a creditor, a debtor and a promisor — that if the debtor would pay the amount of the claim, in money and notes, to the promisor, the promisor would pay the claim of the creditor in plated ware, and the creditor should release the debtor. In pursuance of this agreement, the promisor executed a written undertaking to the creditor to furnish the plate; the creditor, at the same time, executed a written agreement to give his claim against the debtor to the promisor, on the delivery of the plate, and about the same time the creditor released the debtor. The promisor delivered a portion of the plate; and in an action by the creditor against the promisor, for the value of the balance of the plate, *held*, that there had been a substitution of debtors, and the oral promise was not within the statute of frauds; also that the creditor was not bound to assign the claim to the promisor as a condition precedent to the delivery of the plate, or to the beginning of an action for the non-delivery.

ACTION for breach of a contract to deliver plate ware. It appeared that one Mattison was indebted January 31, 1861, to plaintiff, in the sum of \$1,580.07, which he was unable to pay; that an oral agreement was made among Mattison, plaintiff and defendant, that if defendant would settle the debt with plaintiff, so that Mattison should be released by plaintiff, Mattison would pay defendant \$1,000 in cash and the balance of the debt in notes; that thereupon the following written agreements were entered into:

“NEW YORK, January 31, 1861.

“I agree to furnish to the Meriden Manufacturing Company an assortment of plated forks and spoons per L. H. Mattison’s price list, at 70 per cent discount, to settle claim against L. H. Mattison, to be

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delivered in months of February and March. Oval tip'd and Olive not to be ordered.

"The plain and tip'd goods not to exceed $\frac{1}{2}$ of the amount. The spoons and forks to be silver plated, like samples shown.

"(Signed)

G. N. ZINGSEN."

"NEW YORK, January 31, 1861.

"This is to certify that we agree to give our claim against L. H. Mattison up to G. N. Zingsen as soon as he has delivered to us the amount at 70 per cent discount, in spoons and forks, as per his agreement.

MERIDEN BRITANNIA COMPANY,

"(Signed)

H. C. WILCOX."

That Mattison paid defendant the \$1,000 and the notes (which were subsequently paid), and plaintiff, at about the same time, released Mattison from the claim; that defendant delivered to plaintiff plate ware to the amount of \$1,225.19, and a balance of \$354.88 remained due, for which this action was brought. Judgment in favor of plaintiff was affirmed at general term. Defendant appealed to this court.

C. Bainbridge Smith, for appellant.

W. Gleason, for respondent.

EARL, C. There are two theories, upon either of which this judgment can be upheld. We may treat the defendant's agreement as one to pay and discharge the debt of Mattison.

This agreement the defendant claims to be void under the statute of frauds, which provides that "every special promise to answer for the debt, default or miscarriage of another person" shall be void, unless such promise be in writing, expressing the consideration thereof and subscribed by the promisor.

It is not every verbal promise to pay the debt of another that is void within this statute. There are many exceptions, as disclosed by the numerous cases upon the subject.

A promise to pay the debt of a third person is not within the statute, where it is agreed between the parties, the creditor, debtor and promisor, that the debt shall be extinguished and the creditor shall look only to the promisor for payment upon the new promise. In such case no other person remains liable for the debt

but the promisor, and his undertaking is not collateral but original to pay his own debt, and not to answer for the debt of another. There is, then, what is known in the civil law as a delegation, and the creditor takes a new debtor, who is called the delegated debtor.

I. *Anstey v. Marden*, 4 Bos. & Pul. 124, Chief Justice MANSFIELD says that he did not see "how one person could undertake for the debt of another, when the debt for which he was supposed to undertake was discharged by the very bargain." In *Mallory v. Gillett*, 21 N. Y. 412, Chief Judge COMSTOCK, after a very able review of many cases arising under the statute of frauds, gives a classification of the cases not within the statute, and of such cases are these: "When the original debt becomes extinguished, and the creditor has only the new promise to rely upon; for example, when such new undertaking is accepted as a substitute for the original demand." In Throop on the Statute of Frauds, at pages 318, 322, 370, 374, will be found a very able and discriminating review of the cases upon this subject, and the author lays down these rules: "A promise to assume an antecedent liability of a third person is without the statute, if the third person's liability had become extinct at the time when that of the promisor came into existence, or if the third person's antecedent liability to the promisee is discharged in consideration of its assumption by the promisor." And, in this case, it was distinctly agreed between the three parties, the creditor, debtor and promisor, that, in consideration that the father of the debtor would pay the promisor \$1,000 in money, and the debtor give him his own notes for the balance, the promisor would pay the claim of the creditor in plated ware, in the months of February and March thereafter, and the creditor should release the debtor. It was obviously contemplated by the parties that all this should be done at the same time. In pursuance of this agreement, the promisor executed the written undertaking to the creditor, and either then or soon after the creditor released the debtor, and the \$1,000 was paid and the debtor's notes given to the promisor, and the notes were subsequently paid. Hence, this case is clearly within the rules above stated, and the promise of the defendant is not within the statute of frauds. But if this is not the true theory upon which this case should be disposed of, then there is another theory, equally fatal to the defense of the defendant.

The two instruments dated January 31, 1861, executed at the same time, relating to the same subject-matter, must be construed

together as if they constituted but one instrument; and then, as claimed by the defendant, they show a sale of the plaintiff's demand against Mattison to the defendant in consideration of the plated ware to be delivered to the plaintiff by the defendant. Upon this assumption, the defendant claims that the plaintiff must be defeated, because he has never assigned or offered to assign his demand to the defendant, and has placed it out of his power to do so, as he released Mattison.

According to this construction of the agreement between the parties, the defendant was to deliver the plated ware from time to time during the months of February and March, and as soon as he had delivered the whole of it the plaintiff was to give up to him his demand against Mattison. They were not dependent agreements. Performance on one part was not a condition precedent to performance on the other. The plaintiff was clearly not bound as a condition precedent to assign the claim before the defendant was bound to deliver the plated ware. He was not bound to assign it until after the defendant had fully performed on his part. Hence, this case is fully within the rule laid down in *Morris v. Slite*, 1 Den. 59. In that case the action was in covenant by the vendor for the purchase-money upon a contract for the sale of land. The purchaser was to pay the price of the land in five years from the date, with interest annually, and to pay the taxes on the land, and the vendor covenanted that, "after" the purchaser "shall have paid the above sums of principal and interest, at the time and in the manner above specified, and shall have performed the agreement above mentioned," he would sell and convey the land. Chief Justice BRONSON says: "Where it appears, from the terms of the agreement or the nature of the case, that the things to be done were not intended to be concurrent acts, but the performance of one party was to precede that of the other, then he who was to do the first act may be sued, although nothing has been done or offered by the other party. He has not made performance by the other party a condition precedent to his liability, but has trusted to a remedy by action on the agreement.

Here the defendant, after he had performed, could have sued the plaintiff upon his agreement to assign, and could have recovered such damages as he could have proved. And the plaintiff having put it out of his power to assign the claim, the defendant could probably have set up his claim for damages as a counter-claim in

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this action. But what damages has the defendant sustained? What possible good could an assignment do him? The referee has found that Mattison has fully paid to the defendant the whole amount of the claim. And, hence, the discharge of the claim by the plaintiff can work no possible harm to the defendant, and the discharge could work no harm, even if Mattison had not paid the defendant, because, before the discharge was executed, Mattison became obligated to pay the amount directly to the defendant, and that obligation the plaintiff never, in any way, interfered with or discharged.

Hence, upon the whole case, I can see no reason to doubt that the judgment below was fully authorized by the facts of the case, and it should be affirmed, with costs.

Judgment affirmed.

GILLOTT V. ESTERBROOK *et al.*, appellants.

(48 N. Y. 374.)

Trade-mark — use of numerals.

Plaintiff had, for many years, manufactured and sold a steel pen, put up in boxes, with "308" and "Joseph Gillott, extra fine," upon the pens and boxes. Defendant began the manufacture and sale of a steel pen, put up in boxes with "308," and "Esterbrook & Co., extra fine," upon the pens and boxes. *Held*, that plaintiff had required the right to the exclusive use of the figures "308" as a trade-mark; and that an action would lie restraining defendants from using such figures in such manner.

ACTION by plaintiff to restrain defendants from using the figures "308" upon steel pens, and boxes containing them. The case is sufficiently stated in the opinion. Judgment for plaintiff was affirmed at general term. Defendants appealed to this court.

John Sherwood, for appellants.

F. R. Sherman, for respondent.

LOTT, C. C. A manufacturer has the right to distinguish the goods manufactured by him by any peculiar mark or device he may

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select and adopt, by which they may be known as *his* in the market, and thereby secure to himself the profits arising from the fact that they are of his manufacture, and he is entitled to the protection of a court of equity in the exclusive use of the peculiar marks or symbols, appropriated by him, designating or indicating the *true origin or ownership* of the article to which they are affixed against the adoption or imitation thereof by another, so as to mislead the public as to such origin or ownership, and thus effect the sale of his goods as those of the party whose trade-mark is so adopted or imitated.

See *Burnette v. Phalon*, 3 Keyes, 594, and the cases there cited, and particularly the opinion of DURR, J., in that of *The Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. 599, in which the question is examined with great ability, and the rules applicable to it are clearly defined.

Upon the application of the above principles to this case, the facts found by the judge who tried the issues therein entitled the plaintiff to the relief granted to him by the judgment rendered at special term. They show that he had, for many years prior to the commencement of this action, manufactured at Birmingham, in England, and sent to the United States for sale, steel pens of various descriptions, and among them, as early as in the year 1839, one of a peculiar style or pattern, on which was impressed the number "303" and the words "Joseph Gillott, extra fine." The said number was so impressed in said pen by the plaintiff before it had been used by others to distinguish such pattern or character of pen from other patterns made by him, and was adopted and used by him as his trade-mark for said pen in connection with his name and the words "extra fine," and it had become established and well known as such. The said figures were selected arbitrarily by the plaintiff, and of themselves expressed no quality or size of the pen, and no other pens were then used which had said numerals impressed thereon. Since the year 1842 the said pens have been put up in black paper boxes holding one gross each, on the top of which is a label, in the center whereof is the plaintiff's name in larger letters than other prints thereon, and above the name is "No." (meaning number), and below it in large and conspicuous type are the said numerals "303." This pen so marked had become well known to the trade and dealers as a valuable and popular pen; it was in great demand and the most prominent in the market, producing large sales at prices from twenty-five per cent to one hundred per cent higher than the pens

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made in imitation thereof, or of other pens with the same mark or number "303." It was known and ordered by stationers and other dealers by its said number "303," to distinguish it from other pens made by the plaintiff, of other patterns and descriptions.

It is also shown by those findings that the defendants, except Richard Esterbrook, Jr., under the name of R. Esterbrook & Co., are manufacturers of steel pens at Camden, New Jersey, where they commenced the business in 1859 or 1860; that they manufacture and sell a pen which, in size, shape, color, pattern, flexibility and fineness of point so closely resembles the said pen of the plaintiff as to require an expert or adept to distinguish them in those respects; that they have also impressed upon their said pen, in the same place as upon the plaintiff's said pen, the said numeral "303," and the name of the defendants' firm, "Esterbrook & Co.," and the same words, "extra fine," as upon the said pen of the plaintiff; that they also put up their pens in paper boxes of the same size and similar in other respects to those of the plaintiff, and with the same words printed on the label as on his, except the name, which is "Esterbrook & Co." instead of "Joseph Gillott," and above the name on the label, in like manner as on the plaintiff's, is the word "No." and below the name, equally or more conspicuous than on the plaintiff's, are the numerals "303." There is the word "caution" on the bottom of the boxes of both the plaintiff and the defendants; the object of each, in different terms, is to call the attention of the public to the merits of their respective pens. The said defendant, Richard Esterbrook, Jr., was the agent of the other defendants for selling their pens in the city of New York. It is further found by the judge "that the said use by the defendants of said numerals '303' was with a knowledge by them of the rights of the plaintiff to the same, and with the intent to obtain for themselves the profits and advantages to which the plaintiff was exclusively entitled in the use of his said trade-mark, and to mislead the public and defraud the plaintiff in that respect."

The preceding statement of facts clearly shows that the said number was selected and used by the plaintiff as his trade-mark, to indicate, in connection with his name, the origin and ownership of the said pens so manufactured by him, and not to designate their quality merely, and that the defendants, by the adoption thereof, have done it in fraud of his rights, and the plaintiff, upon all the facts found by the judge, was entitled to the injunction granted to him.

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It is, however, claimed by the defendants that the plaintiff has knowingly permitted his said trade-mark to be used by other manufacturers for many years, without interference, and that he has thereby lost the right to the exclusive use thereof. This claim is not sustained or in any manner warranted by the findings of the judge. He does, indeed, find that after the said trade-mark had been adopted by him, and the same had been established and become well known as such, that stationers and others in the city of New York had, for fifteen years before the trial of this action, advertised and sold pens similar in appearance as "303 extra fine pens," and as "manufactured under their own superintendence," when, in fact, they had procured them to be manufactured for them in Birmingham, England, or by the defendants in this country; but he expressly finds "that the plaintiff had no knowledge of said practice, and did not authorize or acquiesce in the same." He is, consequently, not affected thereby. It follows, from the view above expressed, that the judgment appealed from should be affirmed with costs.

Judgment affirmed.

LUDWIG, appellant, v. THE JERSEY CITY INSURANCE CO.

(48 N. Y. 379.)

Fire insurance—change of location of goods insured.

Defendant issued to plaintiff a policy of fire insurance on goods "contained in the first story of the five-story brick building situated at No. 39 Centre street." Subsequently plaintiff moved his goods up stairs, and the agent of defendant received the renewed premium with knowledge of the change in location of the goods, giving a receipt in the words "On stock . . . 39 Centre street," etc. A loss by fire having occurred while the goods were located up stairs, *held*, that plaintiff could recover.

ACTION on a policy of fire insurance. The policy was issued by defendant to plaintiff May 21, 1863, on stock "contained in the first story of the five-story brick building situated at No. 39 Centre street, in the city of New York." Plaintiff moved his stock and business up stairs May 1, 1864; the agent of defendant called upon plaintiff about May 21, 1864, and was informed, and saw, that plaintiff had

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moved up stairs. The agent then received the renewal premium, giving a receipt in these words:

"On stock. Premises — 39 Centre street, city of New York.

"OFFICE OF JERSEY CITY INS. CO., }
"JERSEY CITY, 21st May, 1864. }

"No. 26,954. Received of Henry Ludwig thirty dollars, being the premium on two thousand dollars insured under policy No. 21,863, which is hereby continued in force for one year, to wit: From the twenty-first day of May, 1864, until the twenty-first day of May, 1865, at noon.
J. PALMER, *Secretary*."

The stock was destroyed by fire while located up stairs, December 9, 1864. The question raised at the trial was, whether the policy covered the property destroyed. A verdict for plaintiff was set aside at general term, and a new trial ordered. Plaintiff appealed to this court.

John E. Burrill and *J. F. Malcolm*, for appellant.

John M. Scribner, Jr., for respondent.

HUNT, C. At the close of the evidence, the defendant moved for a dismissal of the complaint upon the ground that the defendant only insured the goods of the plaintiff upon the first floor of the building No. 39 Centre street. This motion was denied, and it is upon this point that the question presented for decision arises. No point was made at the trial that the person to whom notice of the change of location of the goods was given was not a proper person for that purpose. It was not suggested that he had not sufficient authority to receive the notice and to act upon it. No such suggestion can now be made. *Beals v. Home Ins. Co.*, 36 N. Y. 529. The case may be stated in this form: The defendant issues to the plaintiff a policy for one year, covering his goods on the first floor of the building 39 Centre street. The year being about to expire, and the goods having, in the mean time, been removed to an upper story of the same building, the plaintiff gives notice to the defendant of such change of location, pays the renewal premium, and receives a renewal receipt referring to No. 39 Centre street and to the former policy, but expressing, in itself, no restriction as to the first floor of the

building. Upon the occurrence of a fire, can the plaintiff recover his damages?

An insurance against loss by fire may be made by parol as well as by writing. *Fisk v. Cottenet*, 44 N. Y. 538 (4 Am. R. 715). A written contract of insurance may be modified by parol without the passage of any new consideration to support it. *Trustees First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Blanchard v. Trim*, 38 id. 225. Every renewal of a policy constitutes a new contract, and the old contract may be modified in any of its parts at the pleasure of the parties. A contract is to be construed to mean: 1. What its terms plainly express; or 2. What the promisor intended the promisee to understand that it meant. *Botsford v. McLean*, May, 1870. Here the insurance had expired, or was about to expire. No loss had been incurred, and no liability existed. Both parties wished the contract to be extended. The plaintiff desired an insurance upon his goods in the upper stories of the building. He had none in the lower story. The company wished to insure him on his goods where they were, not where they were not. Knowing exactly where they were, they receive the compensation for one year's insurance and deliver him the contract before us. I doubt not that they intended to give him a valid insurance, and intended him to believe that he had received such. To suppose otherwise would impute to them a fraudulent disposition, which there is nothing in the case to justify. The parties supposed that the paper delivered reached the case, and intended that it should. We can accomplish this intent by such a construction of the writing. It is as if the defendant had indorsed upon the policy a memorandum that the location of the goods had been changed, or as if notice of that fact had been verbally given and assented to. The contract would then have been for an insurance upon goods on the first floor, modified as to the floor or story. The modification is established in two modes: 1. By the new paper, which, referring to the policy, describes also the goods as being simply in store No. 39, Centre street; and 2. By the fact that the defendant knew perfectly where the goods were, and insured them there, or intended the plaintiff to suppose that it did so insure them. *Botsford v. McLean*, *supra*. If the plaintiff had said to the defendant at its office, I have removed my goods to the third story, I wish to continue the insurance for one year, and had paid it thirty dollars, which it had received, it would certainly have been liable in case of a loss. The reference to the first story in the original policy

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would have been deemed to have been modified by the notice and the acceptance of the premium. The plaintiff had lost nothing by taking a receipt which, so far as it goes, sustains his view of the case.

The only support of this defense is the position that, when it gave the renewal receipt, the defendant did not intend to make any further insurance. This cannot be sustained without an imputation on its honesty. It knew when it took the premium that something was expected of it. Men do not pay moneys to insurance companies gratuitously, without expectation of benefit or return. It knew, also, that the plaintiff had no property on the first floor to be protected. The only possible alternative is the case claimed by the plaintiff, to wit: That the original contract was understood and intended to be modified by applying the policy to the goods on the upper stories. *Solnies v. The Rutger Fire Ins. Co.*, 3 Keyes, 416; *Mayor v. Exchange Fire Ins. Co.*, id 436; *Plumb v. Cattaraugus Co.*, 18 N. Y. 392.

The order for a new trial should be reversed, and judgment ordered for the plaintiff upon the verdict, with costs.

Order reversed and

Judgment accordingly.

ASHLEY *et al.*, Executors, v. DIXON, appellant.

(48 N. Y. 430.)

Breach of contract — want of privity.

Where A has agreed to sell property to B, C may, at any time before the title has passed, induce A not to let B have the property, and to sell it to himself, provided he be guilty of no fraud or misrepresentation, without incurring any liability to B. In such a case A alone is liable to B for the breach of contract; and B cannot maintain an action against C for damages.

ACTION for damages brought by the representatives of McEachron, deceased, plaintiffs, against Dixon, defendant. It appeared that on the 24th of January, 1863, one Patrick contracted to sell and convey to McEachron, plaintiffs' testator, certain premises, the deed to be delivered April 1, and the purchase-money to be paid April 3; that

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McEachron contracted February 10, 1863, to sell and convey the premises to defendant, the deed to be delivered and purchase-money paid April 1; that subsequently defendant induced Patrick, by offering a larger price, not to perform his contract with McEachron; that McEachron demanded his deed and tendered the purchase-money to Patrick on the 1st day of April, or as soon thereafter as possible, but the tender and demand were refused; that defendant made tender and demand of McEachron April 1, under his contract; that Patrick conveyed the premises to defendant April 4. At the trial, plaintiffs obtained a verdict for \$566.58. Judgment thereon was affirmed at general term. Defendant appealed to this court.

M. Fairchild, for appellant.

James Gibson, for respondents.

EARL, C. If this be treated as an action to recover the purchase-price of the real estate which McEachron contracted to sell to the defendant, or as an action to recover the liquidated damages mentioned in the contract, the action must fail, for the reason that McEachron did not perform, and was not able to perform on his part.

If the action be treated, as it was on the trial, as one to recover damages for a conspiracy between defendant and Patrick to defraud McEachron out of his contract with Patrick, and to prevent the performance of his contract with the defendant, then the action must fail, because there was not sufficient proof of such a conspiracy, and the motion to nonsuit the plaintiffs should have been granted. There was no evidence which would warrant the jury to find that Patrick absented himself from home, or refused to perform his contract with McEachron, at the instigation of the defendant.

But even if defendant had induced Patrick not to perform his contract, that alone would not make him liable to the plaintiffs for damages. He could advise and persuade Patrick not to convey the land, under his contract with McEachron, and could, by offering more, induce him to convey to himself, without incurring any liability to McEachron, so long as he was guilty of no fraud or misrepresentation affecting McEachron. If A has agreed to sell property to B, C may, at any time before the title has passed, induce A not to let B have the property, and to sell it to himself, provided he be guilty of no fraud or misrepresentation, without incurring any lia-

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bility to B; A alone, in such case, must respond to B for the breach of his contract, and B has no claim upon or relations with C. While, by the moral law, C is under obligation to abstain from any interference with the contract between A and B, yet it is one of those imperfect obligations which the law, as administered in our courts, does not undertake to enforce. But if C makes use of any fraudulent misrepresentations as to B, to induce A to violate his contract with him, then there is a fraud, accompanied with damages, which gives B a cause of action against C; as if C fraudulently represents to A that B had failed or absconded, or had declared his intention not to sell to B, and thus induces A to sell to another.

Here there is no proof of any fraudulent representations made by defendant to induce Patrick to violate his contract with the plaintiffs.

Hence, I can conceive of no theory, upon the facts as they appear before us, upon which this action can be maintained.

The judgment must be reversed and new trial granted, costs to abide event.

Judgment reversed.

REED, appellant, v. THE UNITED STATES EXPRESS CO.

(48 N. Y. 402.)

Express company — liability as "forwarders."

An express company received at Chicago a package of bank bills marked, according to the receipt, "Bank of Dalton, Georgia, for redemption, which we undertake to forward to Dalton, perils of navigation excepted; and it is hereby expressly agreed that" this company "are not to be held liable for a loss or damage except as forwarders only." The company's line terminated in New York. *Held*, that it was not the company's duty to carry the package to Dalton, present it at the bank for redemption, and receive and return the proceeds, or, if not redeemed, to return the package; but that it was the company's duty simply to carry the package to New York and place it in the hands of a connecting company.

ACTION by Reed against The United States Express Company. The principal question involved in the case is relative to the con-

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struction of the contract for the carriage of a package of bank bills which defendant received of plaintiff at Chicago. The contract, as evidenced by the receipt, was as follows:

"Received of Peter Reed one package, said to contain currency valued at \$904, and marked Bank of Dalton, Georgia, for redemption, which we undertake to forward to Dalton, perils of navigation excepted; and it is hereby expressly agreed that the United States Express Company are not to be held liable for a loss or damage except as forwarders only." Upon the left margin of the receipt was the following: "The United States Express Company will forward bank notes, gold and silver, merchandise and packages, and collect notes, drafts and accounts, daily, between New York, Philadelphia, Boston, Albany, Buffalo, Dunkirk, Cleveland, Detroit, Dayton, Cincinnati, Sandusky, Toledo, Chicago, Rock Island, St. Louis, Iowa City, Kansas City, Omaha City, and other principal towns and cities of the west and south-west, California and Europe."

The opinion sufficiently states the other facts. A verdict for plaintiff was set aside at general term, and a new trial was ordered. Plaintiff appealed to this court.

Geo. N. Kennedy, for appellant.

Sherman S. Rogers, for respondent.

GRAY, C. That the defendant's route from Chicago, in the direction of Dalton, Ga., terminated at the city of New York, was an undisputed fact, and, if it had been necessary to prove that the plaintiff, at the time of leaving his package with the defendant, knew that fact, and that the defendant had no interest in or control over any route between New York and Dalton, the evidence was quite sufficient to justify such a finding. The fact that the defendant, within four days after the receipt of the package, delivered it to the Adams Express Company to be forwarded as directed, does not seem to have been questioned at the trial, nor was any question made as to the responsibility of that company. All these facts were substantially conceded by the learned judge at the circuit, who refused to recognize the general principle that the obligation of an express company is simply to carry safely to the end of its own route and then deliver its freight in the condition in which it was received to the next carrier upon the line with proper direc-

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tions (see 2 Redf. on Law of Railways [4th ed.,] subd. 14 of § 169, p. 23, as applicable to this case), "because," as he said, "here is an express company receiving a package, and giving a receipt to carry it through to Dalton, Georgia;" and upon this ground alone he placed the plaintiff's right to recover. Such was not the language of the receipt; the undertaking was to forward the package (not to carry it) to Dalton, and, by the terms of the receipt, its liability was expressly limited to that of a forwarder. If, therefore, its language can be construed into an undertaking to do otherwise than forward, or, in equivalent language, send it by another safe line from the termination of its own line, there should be something in the surrounding circumstances indicative of the defendant's intention that the plaintiff should understand from the terms of the receipt that it intended to become liable for the negligence of the connecting lines between the termination of its own line and Dalton, in which it had no interest and over which it had no control. There was not even evidence that there were competing lines between Chicago and Dalton, or any circumstances, however slight, contributing to the establishment of any motive or interest which could have prompted such an undertaking.

The charges from Chicago to Dalton were not paid, as in the case of *Wood v. The Saratoga and Schenectady Railroad Company*, (19 Wend. 535), and if the contemporaneous entry of the transaction, made in the defendant's books, had not been erroneously rejected (*Barker v. The N. Y. C. R. R. Co.*, 24 N. Y. 599), it would have appeared that the defendant's only charge for its services was one dollar, a moderate price for transmitting the package over its own line from Chicago to its termination in New York. It was urged that, by a just interpretation of the language of the receipt, it was apparent that the defendant's engagement was to carry the package to Dalton, present it at the bank for redemption, and receive and return the proceeds, and, if it was not redeemed, to return the package. The original receipt was not produced. Secondary evidence of its contents, furnished by the plaintiff, was its substitute, the accuracy of which was not conceded by the defendant. If the secondary evidence is susceptible of the construction the plaintiff claims for it, the court erred in not permitting the defendant to prove the contents of the contemporaneous entry of the transaction, in which it did not appear that the contents of the package was received, and to be, by the defendant, presented for redemption, in

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connection with the evidence offered of the custom of the office, whenever the company was to make collections, to enter that fact on its books as a part of the transaction; all this had a bearing as to the accuracy of the copy of the receipt produced by the defendant. But assuming the copy to have been accurate, the plaintiff's construction of it cannot be sustained. The package was directed to the bank of Dalton; the undertaking was to forward it to that bank, who, by the direction upon the package, was made its consignee. The apparent object of the consignment was the redemption of the currency contained in it; redeeming it or seeing to its redemption was a trust confided to the consignee. My conclusion is that, by the contract, the defendant undertook to carry the package over its own line and to forward, or, in equivalent language, send it from the termination of its line, in the same condition it was received, by a connecting route; all of which was done by the safe delivery of the package to the Adams Express Company with proper directions. Upon this ground, as well as for the errors stated in rejecting evidence offered by the defendant, the order granting a new trial should be affirmed, and judgment absolute ordered in favor of the defendant, with costs to be adjusted.

HUNT, C., delivered a dissenting opinion. LOTT, C. C., also dissented from the result.

Order affirmed, and judgment absolute against plaintiff.

SALT SPRINGS NATIONAL BANK v. WHEELER, appellant.

(48 N. Y. 422.)

Conversion — accidental loss or destruction.

Defendant received bills of exchange for acceptance, and, on demand for them by the persons entitled thereto, he looked for them, but not finding them said he might have burned them up with papers he considered of no value. Held, that he was not liable in trover, there being no evidence of a voluntary or intentional destruction or loss of the bills.

ACTION for the conversion of three drafts or bills of exchange. The opinion states the facts. A judgment in favor of plaintiff was affirmed at general term. Defendant appealed.

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W. B. Smith, for appellant.

Hunt & Green, for respondent.

HUNT, C. The advantage of an action in trover, rather than an action in assumpsit, in the collection of a debt, is apparent. It gives a right to hold to bail during the pendency of the action, and a right of imprisonment upon an execution, in addition to the usual resort to the property of the defendant. To procure this advantage the plaintiffs have passed by their plain and obvious remedy of an action against the defendant for a breach of contract, and have brought an action of trover. The question is, whether they can sustain it.

During the autumn of 1865, the defendant being indebted to the firm of Jaycox & Green in the sum of \$1,012.18, that firm drew upon him for the amount, in three several bills of exchange, at one month each. These bills were discounted by the plaintiff at about the time of their several dates, and had all matured before the 30th day of December. On that day one of them had been due two and a half months, the second nearly two months, and the last a few days. These drafts were severally transmitted by the plaintiff to the defendant for acceptance and payment, he being engaged in the business of a banker also. Before the 30th of December the defendant failed and made an assignment. On that day the plaintiff's agent demanded of him the drafts in question. He replied that he thought he had returned them to the plaintiff. Upon reflection and examination he stated that he could not find them, and that he might have burned them up in destroying other papers that he considered of no value. It was not pretended by any witness that the defendant asserted any title to the bills, or claimed any right to hold or retain them. There was no reason to doubt the accuracy of the defendant's statement. The judge finds that they were lost, mislaid or destroyed, through the negligence of the defendant. He also finds that he "converted the same."

To authorize the action of trover, two things are necessary: 1. Property in the plaintiff with a right of possession; and 2. A conversion by the defendant of the thing to his own use. This conversion consists of the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in defiance of the plaintiff's right, or in withholding it under a claim of title. 1 Greenl. Ev., § 642, and cases cited.

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The destruction referred to as constituting a conversion is an intentional destruction, not an accidental act. Thus, a misdelivery of goods by a bailee is a conversion. *Id.*, and *Deming v. Barclay*, 2 B. & A. 702; *Seyd v. Hay*, 4 T. R. 260. But the accidental loss by the carrier is not. *Ross v. Johns*, 5 Burr, 2825; *Dwight v. Benton*, 1 Pick. 50. A wrongful sale is a conversion, but a purchase in good faith is not in the first instance a conversion. *Id.*, § 642. The accidental loss or destruction of an article by one lawfully in its possession has never been held to be a conversion. *Bromley v. Coxwell*, 2 B. & P. 438; *Cairns v. Bleeker*, 12 J. R. 300; *Jervis v. Jolliffe*, 6 id. 9.

In *Laplace v. Aupois*, 1 Johns. Cas. 407, cited to the contrary, it appeared that the goods had been placed in the defendant's possession, and had been sold by him, contrary to the orders of the owner. Their subsequent loss on the voyage on which they were shipped was held to make no difference. The defendant was guilty of a direct act of conversion and the action was well brought.

On the question whether trover will lie to recover bills of exchange situated like these, two cases have been cited, viz.: *Treuttel v. Barandon*, 8 Taunt. (4 E. C. L.) 33, and *Evans v. Kymer*, 1 Bar. & Ad. 528. Neither of these cases resembles the one before us in its essential elements. In *Treuttel v. Barandon*, the plaintiffs were the owners of the several bills of exchange, drawn respectively by Gorton and G. Cresswich upon Spears, indorsed: "Pay to I. P. De Rouse, Esq., or order, for account of Messrs. Treuttel & Wentz." These bills were placed or left by the plaintiff in the hands of De Rouse as their agent, to be used for the plaintiffs, and as directed by them. De Rouse negotiated them as security for his private loan. The plaintiffs demanded the bills, and, upon refusal, brought trover for their recovery. The defendants claimed to have obtained the bills by purchase from De Rouse, and insisted upon the validity of their title. The court held that the form of the indorsement gave sufficient notice that the bills were property of the plaintiffs, and gave judgment for their value. The case varies from the one before us, in the important particulars that the bills were still in existence, and that the defendants obtained possession of them without just right, and insisted upon their ownership.

In the case of *Evans v. Kymer*, the bill was drawn by Nevett upon the plaintiff, accepted by him, and retained by Nevett in his possession for the convenience of the plaintiff, and to be used as by him

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directed. Nevett negotiated the bill to the defendant for value, but with knowledge of all the facts. The defendant claimed the right to hold the bill. Trover was brought for the bill, and the chief defense was that the plaintiff himself never had sufficient property in the bill to maintain trover. The action was maintained; Lord TENTERDEN closing his opinion with this remark: "The jury here were directed to find the value of the bill, in case they found their verdict for the plaintiff. If the defendant deliver up the bill, nominal damages may be entered on the record." This case is authority that the plaintiff here had sufficient property in the bills to sustain the action, which, indeed, upon the facts as found, is too clear to need any authority. It establishes nothing else pertinent to the case before us. Demand and refusal do not establish a conversion to the defendant's own use, where, as in this case, it appears that at the time of the demand the bills were not in existence. They had been previously and accidentally destroyed. The failure to deliver that which is not in being and cannot be delivered, furnishes no evidence of an appropriation by the defendant. *Murray v. Burling*, 10 Johns. 172, and *Decker v. Mathews*, 12 N. Y. 313, are cases where the party sued had wrongfully transferred the bill, and received and applied the proceeds to his own use. They furnished no authority upon the case before us, which is one of an accidental loss or destruction of the bill, no money being received upon it. Upon all of the authorities I have been able to consult, my judgment is that there was no evidence of any conversion of these bills. There was never any denial of the plaintiff's property; there was no claim of property in the defendant; there is no evidence of a voluntary or intentional destruction of them.

I see no reason why the plaintiff should not be left to the remedies upon contract that are open to it. By the statute of this State (1 Revised Statutes, 769, § 11), "Every person upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, who shall destroy such bill, or refuse within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, shall be deemed to have accepted the same." This statutory provision is in affirmance of the common law, which holds that when a bill is left with a drawee for acceptance and retained by him beyond a reasonable time, the bill is to be deemed accepted. So if the bill be destroyed by the drawee while in his hands. *Harvey v. Martin*,

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1 Camp. 425; *Joune v. Ward*, 1 Bar. & Ald. 657, 663; Edwards on Bills, 396; Bayley on Bills, ch. 6, § 1, p. 100.

I see no reason again why the defendant is not liable, upon his implied promise to present the bill for acceptance, to receive and transmit the money if paid, and in case of refusal to accept or of non-payment, to notify the plaintiff. The transmission to him and the receipt for this purpose render him liable for the breach of this duty.

I am of the opinion that the judgments should be reversed and new trial ordered, costs to abide the event.

Judgment reversed.

HILLS v. PLACE, appellant.

(48 N. Y. 530.)

Promissory note — Liability of maker when payable at a bank.

A promissory note payable at a bank was presented for payment by the holder at eleven o'clock on the day it was due, but it was not then paid. The maker between eleven and twelve o'clock of the same day put funds in the bank, and gave instructions to have the note paid on presentation. After that it was not presented again, although it was the custom to allow until three o'clock for payment of such notes. The maker subsequently withdrew the funds from the bank. In an action by the holder against the maker, *held*, that the maker was liable, and the money not having been brought into court, the holder was entitled to judgment with costs.

ACTION on a promissory note brought by the indorsee against the maker. The opinion states the facts. Judgment in favor of plaintiff was affirmed at general term. Defendant appealed to this court.

H. C. Place, for appellant.

J. R. Hills, for respondent.

LORR, C. C. The evidence given on the trial, most favorably construed to the defendant, does not prove payment or establish facts sufficient to bar a recovery for damages and costs, as well as the principal of the note.

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It shows that the note was presented for payment on behalf of the plaintiff at the Hanover National Bank, where it was made payable, about eleven o'clock of the day it fell due, and that it was not then paid; that the defendant, on being notified of the fact by the cashier, immediately thereafter, between eleven and twelve o'clock, "put funds in the bank and gave instructions to have it paid on presentation."

It was not presented for payment to or at the bank or to the plaintiff, at any time or place after the funds were so left, before the commencement of this action.

The cashier of the said bank, on being asked "what is the custom of banks in the city of New York in reference to presenting notes?" answered, "that the custom is to present a note for payment between ten and three o'clock, but a man has until three o'clock to pay his note, and it cannot be protested until after three o'clock." He also stated that ordinarily notes are presented between ten and three o'clock, and if a note is not paid on the first presentation thereof, that it is necessary to present it again for the second time, according to custom, and that "the notary never goes until three o'clock."

It is clearly established, by the preceding statement, that the note in question was never in fact paid to the plaintiff, but it is shown, on the contrary, that the funds which were left at the bank, to be applied to its payment on presentation, were shortly thereafter actually withdrawn by the defendant himself.

There is no ground for the theory or claim of the defendant's counsel, that "the parties agreed in the note to make the Hanover Bank the mutual receiving agent, and a payment to that agent on the third day of grace of the \$230 to pay the note, and an acceptance of that by the agent, was a payment of the note, and the maker had then discharged his obligation, and the holder had only to go to the common agent, the bank, and receive the money."

The bank was in no sense the plaintiff's agent for the collection of the note, or the receipt of the amount due thereon, or otherwise.

It was named, in the connection in which it was used, merely as the *place* where its business was transacted, for the purpose of making payment of the note *there*, without conferring or intending to confer any power, authority or duty on the association itself in reference thereto.

Such designation did not make it incumbent, as a precedent con-

dition, to create a liability or obligation by the maker of the note to pay it or to give a right of a recovery thereon, that it should be presented at that particular place for payment. The effect or consequence of an omission or failure to make such presentment was not to exonerate the maker from his promise to pay what he had agreed, but only to relieve him from damages in case he was ready at the time and place appointed to pay it, and there was no one there to receive the money. Such readiness is considered equivalent to a tender of the sum payable, and an answer pleading that fact, and a payment of the money due into court, would be a bar to a recovery of interest and costs, but not to the cause of action.

This principle is settled by the decisions in *Wolcott v. Van Santvoord*, 17 Johns. 248, and *Caldwell v. Cassidy*, 8 Cow. 271.

The custom referred to by the cashier does not interfere with that principle. It evidently does not affect the maker's liability. It only shows that the usual banking hours are allowed him to make his payment, and that his note cannot be protested till they have passed.

Assuming that the leaving of the money in the bank, after the demand made by the plaintiff, was sufficient proof of his readiness to pay the note, and is to be considered as a tender of payment in due time, yet he has entirely failed to show that he ever brought the money into court; and as a protest is never necessary to charge or hold the maker, it follows, from the views above expressed, that the plaintiff was entitled to recover the amount of the note with interest; and, there being no-disputed questions of fact, the court was authorized to give a direction to the jury to find a verdict in favor of the plaintiff, for both principal and interest.

It is, therefore, unnecessary to consider the sufficiency of the exception to that direction, so far as it related to the right to recover interest, or what was the effect of the presentment of the note and the refusal to pay it before the deposit of the funds to meet it. The judgment appealed from must be affirmed, with costs.

Judgment affirmed.

Fernandez v. The Great Western Insurance Co.

FERNANDEZ V. THE GREAT WESTERN INSURANCE Co., appellant.
SAME V. THE NEW YORK MUTUAL INSURANCE Co., appellant.

(48 N. Y. 571.)

Marine insurance — deviation

A policy of insurance was issued on a vessel undergoing repairs in New York "at and from New York to Havana." On the completion of the repairs, the vessel went on a trial trip to Elizabethport, sixteen miles distant, and to take in coal. She returned to New York, and sailed thence to Havana. *Held*, a deviation so as to avoid the policy.

ACTIONS on two policies of marine insurance, brought by Antonio R. Fernandez *et al.*, plaintiffs in both actions, against The Great Western Insurance Co., defendant, in one action, and The New York Mutual Insurance Co., defendant, in the other.

The policies were issued to the amount of \$7,500, for a premium of \$375, on the vessel, her tackle, apparel and furniture, "at and from New York to Havana," and declared that the adventure should continue until the vessel should be safely arrived at Havana, and be there safely moored twenty-four hours. At the time the insurance was effected, the vessel was undergoing repairs in New York. But on the completion of the repairs she made a trial trip to Elizabethport, New Jersey, about sixteen miles distant, and to take in coal. She returned to New York, and sailed thence to Havana, and was lost on the voyage. Judgment for plaintiffs was affirmed at general term, and new trial denied. Defendants appealed, in both cases, to this court.

Joseph H. Choate, for Great Western Insurance Co.

R. S. Emmett, for New York Mutual Insurance Co.

Richard Huntley, for respondent.

LOTT, C. C. Assuming that the policies on the vessel insured continued in force till the 6th day of April, after their respective dates, her trial trip to Elizabethport on that day avoided them and discharged the defendant from liability for any subsequent loss. The

vessel was insured "*at and from New York to Havana.*" This insurance imposed a liability on the defendants from the time it was effected, and was to continue till the arrival of the vessel at Havana, allowing her to remain a reasonable time at New York, preparatory to sailing for her place of destination. A continuous and indivisible risk was contemplated, and for that, one single premium was fixed and agreed to be paid. There was no division or apportionment of that premium applicable to separate and distinct risks, one having reference to the vessel during her stay in New York; and the other to perils after her departure. The provision in the policies that the adventure upon her was to begin "*at and from*" New York, and *so continue and endure* until her safe arrival at Havana, and being moored there for twenty-four hours in good safety, clearly defines when the liability was to commence, and shows that it should be continuous from that time until the period fixed for its termination.

A departure from New York, except on the voyage to Havana, is inconsistent with that provision and the continuity of risk contemplated by it, and the subsequent clause providing that it should and might be lawful for the said vessel, on her voyage, to proceed and sail to, touch and stay at any port or places, if thereunto obliged by stress of weather or other unavoidable accidents, without prejudice to the insurance, declares, by necessary implication, that a deviation for any other cause would be unauthorized, and, consequently, could not be made without impairing the claims of the assured. Elizabethport was not a part of or within the port or harbor of New York, but is in the State of New Jersey, distant sixteen or twenty miles from New York, and not in the ordinary course of a voyage to Havana, and no necessity is shown for proceeding to that place, either for making a trial trip or taking in coal. That voyage must, in the absence of any proof to warrant it, be considered as voluntarily made, and in violation of the terms and conditions upon which the liability of the defendants was assumed. It was entirely distinct from and unconnected with the voyage insured. Although the vessel returned to New York and afterward sailed for Havana, that was not the voyage in the contemplation of the parties or intended to be insured, when the insurance was effected. They acted and made their contract, having reference to the facts and circumstances existing at that time. The vessel was then nearly ready for sea. It was expected that she would sail in a few days, and that on leaving New

York she would proceed direct on her voyage to Havana. There is not the least foundation or any plausible color to justify the conclusion or any inference that either party, when referring to the adventure "at and from New York," described in the policies, had reference to or could have meant one that should begin after the vessel had sailed therefrom and again returned thereto, subsequent to a voyage to another place or port; or, in other words, that it should begin after an independent and intermediate voyage had been made and entirely completed. It is also clear that when the vessel was at Elizabethport she was neither at New York nor on a voyage therefrom to Havana, and consequently the policies had at that time ceased to protect her, and nothing that subsequently occurred could restore the obligation of the underwriters and again renew their liability, without their consent. It follows, from the preceding considerations, that there was such a deviation from the voyage insured as to discharge the defendants from their liability under the policies. Their motions for the dismissal of the complaint should therefore have been granted, and the judgments were erroneously ordered against them.

It is, however, proper to refer to the opinion of the majority of the court below on ordering judgment for the plaintiffs. MONELL, J., by whom it was given, says: "Although the underwriters are discharged if the loss occurs upon a policy 'at and from' a port of departure while the vessel is away from such port for any unexcused purpose," yet they will not be absolved if the vessel returns in safety and is afterward lost upon her voyage; and one reason is that the policy covers two risks, one at the port of departure and the other from such port upon the voyage to the port of destination. These risks are wholly independent and distinct from each other. The former insures against the enumerated perils while the vessel lies in port, and if she is taken from such port for any unjustifiable purpose, and is lost while absent from such port, the obligation of the insurers is at an end. The latter risk is limited to the voyage, and takes effect upon the departure of the vessel. If, at that time, no loss has occurred, the contract continues binding."

That construction cannot be sustained. No case or authority is cited to support it, and the court concedes that it is opposed to and adverse to the decision in *Brown v. Tayleur*, 4 Add. & El. 241; 31 Eng. C. L. 60.

In that case the insurance was on a ship "at and from her port of

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lading in North America to Liverpool." After she had taken a part of her cargo on board at one port, she sailed to another in the same bay of the sea, described by different witnesses as five and seven miles distant, but not in the line of voyage to Liverpool to complete her loading. After remaining there three weeks, and taking in additional cargo, she returned to the port which she had left to receive provisions, water and wood, and to be got ready for sea. Nine days afterward she sailed for Liverpool, and was lost on the voyage.

It was held (Lord DENHAM, O. J., and PATTERSON, WILLIAMS and COLERIDGE, JJ., *seriatim*, giving opinions), that the port where she commenced loading was her port of lading, within the meaning of the policy, and that her departure therefrom to another port, as above stated, was a deviation, and avoided the policy.

The same principle was decided by the supreme court of this State in *Vos v. Robinson*, 9 Johns. 192. In that case the voyage insured was "at and from Port Plata, St. Domingo, to New York," and the vessel covered by the policy was shipwrecked and lost in going from Port Plata to Susua. She had a permit from the government at Port Plata to go to Susua for the loading of mahogany, and would have been obliged to return to Port Plata for her clearance. Susua was included within the revenue district of Port Plata, and about four leagues east therefrom. It was held that Port Plata proper was the port of departure, and that there was a *deviation* from the voyage insured. It will be seen that the vessel had not cleared for New York, and consequently was not in the course of her voyage there at the time of her loss, but that she had to return to Port Plata, her port of departure. The result of the decision, therefore, is, that the policy ceased to be binding and effectual after the vessel left that port, although for a temporary object and purpose only, and with the intention, on the part of her master, to return thereto; and it affirms the proposition above stated by me, that the vessel insured, under the policies in question, was not protected or covered by them when she was at Elizabethport. See, also, 1 Phil. on Ins., § 1000; 2 Pars. on Ins., 7, 46-52.

Without further citation of authorities, a perfect answer to the position that the policy covered two risks, independent and distinct from each other, exists in the fact that there is but one *single and entire* premium. What portion of this was applicable to the risk on the vessel while in port, and what portion on that during her

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voyage? It is impossible to say. It may also be asked if there were two risks, how much was the amount insured on each risk? Certainly not the whole sum of \$7,500 specified in the policies, and there is no means of determining the proportion; and if, for any cause, the plaintiffs should have become entitled to a return of a portion of the premium on either risk, how much would have been returnable?

I forbear to pursue these inquiries or the further consideration of the question. If it be conceded that there were separate, distinct and independent risks, the fact does not benefit the plaintiffs. It would then follow, as a practical result, that there are, in effect, two policies, one on the vessel while in port "at New York," and the other on her voyage "from New York." The latter, under the facts disclosed in the case, never attached. The voyage to Elizabethport clearly is a bar fatal to a recovery. That was a new, distinct, different and intermediate voyage, not in contemplation of the parties at the time their contract was made, and it operated as an abandonment of the voyage insured. See 3 Kent (5th ed.), 317; Parsons' Mercantile Law, p. 457.

Having reached the conclusion that the judgments appealed from are erroneous, on a ground common to both cases, I do not deem it necessary to consider the effect of the bill of sale from the plaintiffs to Kain, nor any of the other questions raised on the trial.

The judgments must be reversed and a new trial ordered on the ground stated, costs to abide the event.

HUNT, C., delivered a concurring opinion.

Judgment reversed.

CALKINS, appellant, v. SMITH.

(48 N. Y. 614.)

Partnership. Fraud. Assignment of cause of action.

A partner made his promissory note and indorsed it in the firm name without his copartners' knowledge or consent, in payment of an individual debt to defendant, who took the note with knowledge of the facts, and in order to bind the firm, indorsed it before maturity to a *bona fide* holder for value.

The note was paid out of the firm assets. *Held*, that defendant was guilty of a fraud for which he was liable in damages; but that the fraud was not upon the firm, but upon the individual partners, who did not consent to the indorsement of the note, and that the cause of the action against defendant did not pass to plaintiffs by a general assignment of the assets of the firm, or by a conveyance to plaintiffs of the firm interest of a partner injured by the fraud.

ACTION by James Calkins *et al.* against James M. Smith. It appeared that in April, 1861, C. W. Grannis, James Calkins, G. A. Scroggs and Rollin Germain entered into partnership under the name of Germain & Co.; that in May, 1862, Rollin Germain made two promissory notes payable to the order of Germain & Co., and indorsed them to defendant in the firm name without the knowledge or consent of his copartners, and in payment of individual debts due by Rollin Germain to estates of which defendant was executor and administrator; that defendant took the notes with knowledge of the facts, and, in order to bind the firm, indorsed them before maturity to the New York and Erie Bank, which took them *bona fide* and for value, and defendant, with the proceeds, paid the amount of the debts due the estates; that in September, 1862, an action was commenced to dissolve the firm and a receiver was appointed, the notes were presented to the receiver and paid by order of the court out of the assets, and the receiver subsequently, and under order of the court, assigned the remaining assets to plaintiffs; that C. W. Grannis assigned his interest in the firm property to plaintiffs; that Germain and Scroggs also assigned their interest in the firm property to plaintiffs. Judgment in favor of defendant was affirmed at general term. Plaintiffs appealed to this court.

C. C. Torrance, for appellants.

John Ganson, for respondents.

EARL, C. I propose to consider in this case but one question, which I regard as decisive of this appeal. When Germain indorsed the name of Germain & Co. upon the notes, without the knowledge or consent of his copartners, to pay his private debt, he undoubtedly committed a fraud upon them; and if the defendant aided in this fraud by transferring the notes to a *bona fide* holder,

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who could enforce them against all members of the firm, he was also guilty of a fraud, and liable to the copartners of Germain for all the damage he occasioned to them. But the fraud was not upon the firm. It was upon the three partners who did not consent to the indorsement. Germain, who made the indorsement, was not defrauded, and the firm could not have sued to recover damages for the fraud.

I am inclined to think that the fraud was not a joint fraud for which the three partners could unite in a common-law action. But it was a fraud upon each partner separately, for which he could sue alone to recover the damage which he sustained. The damage sustained by each partner was not the same, but was in proportion to his interest in the partnership. This is a common-law action for fraud, in which the plaintiffs base their right to recover upon a cause of action for fraud assigned to and jointly held by them. Plaintiffs' counsel, upon the argument before us, claimed that "plaintiffs took their title to this demand through the assignment from the receiver." But it passes my comprehension how they could get title to the cause of action from that source, as Tift was appointed receiver only of the assets of the firm. This cause of action was no part of the assets of the firm, was never vested in Tift, and he could not therefore transfer any title thereto to the plaintiffs. And the plaintiffs did not get any interest in the cause of action by virtue of the assignment to them from Scroggs and Germain, contained in the agreement of January 7, 1863. This is so, aside from any other reason that might be assigned, because they only assigned "all their right, title and interest in and to the property and effects of said firm of Germain & Co., and the choses in action of said firm of every nature and description whatever." This assignment did not cover this cause of action.

For the same reason the plaintiff, Henry W. Grannis, did not get any interest in this cause of action by the assignment to him from Charles W. Grannis, dated June 6, 1863, because that was an assignment only of the assignee's interest in the assets and property of the firm.

The sale of the assets of the firm to the plaintiffs could not, in any way, vest them with this cause of action for the alleged fraud. It is true that the fraud diminished the assets, but it was perpetrated months before the sale. It was not a fraud upon Henry W. Grannis, but upon the three partners of Germain. The plaintiffs took

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the assets as they were when they bought them. The fact that they had been diminished by a prior fraud, in no way connected with the sale to them, gives them no cause of action. The defendant had nothing to do with the sale of the assets, and the fact that he may have committed a fraud affecting the value of the assets upon the prior clause cannot make him liable to the plaintiffs.

Hence, it is quite clear that Henry W. Grannis had no title to or interest in the cause of action, and that the plaintiffs have not, therefore, any joint interest in the cause of action which enables them to maintain this action.

If the alleged fraud was committed, it gave a cause of action to the plaintiff, Calkins, to the extent of his injury as one of the partners, which he could have prosecuted alone against the defendant, and probably the court had the *power* in this action, if the claim had been made, to have awarded to Calkins his damages in this action, giving judgment against the other plaintiffs under section 274 of the Code. But the court was not *bound* to do this, and committed no error in defeating the plaintiffs because they did not establish a cause of action in which both were interested. But the claim that Calkins had a separate cause of action for the fraud upon him was not put forth in the complaint, nor made upon the trial, nor upon the argument before us; and hence, even if we should decide that, upon all the facts appearing in the case, he had a separate cause of action, it would not be proper for us, upon that ground, to reverse the judgment below.

The judgment, therefore, should be affirmed, with costs.

GRAY, C., delivered a dissenting opinion.

Judgment affirmed.

SNOW, appellants, v. THE COLUMBIAN INSURANCE CO.

(48 N. Y. 624.)

Marine insurance—prohibited ports.

An insured vessel was sailing toward a prohibited port with the intention of entering, when she was lost at sea. *Held*, that the policy was not avoided. A warranty not to use a certain port means not to go into it, an *intention* to use a prohibited port does not violate the policy.

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ACTION on a policy of marine insurance, issued September 8, 1864, upon plaintiffs' vessel lying at Boston. The policy contained the following clause :

"Warranted not to use ports on the continent of Europe north of Hamburg, nor to go east of Navarino in the Mediterranean, during the period insured ; nor ports on the continent of Europe north of Antwerp between first November and first March ; nor ports in the British North American provinces, except between the fifteenth day of May and fifteenth day of August ; also, warranted not to use the West India Islands during the month of August and September ; also, warranted not to use ports and places in Texas, except Galveston, nor foreign ports and places in the Gulf of Mexico, nor places on or over Ocracoke bar ; nor any of the West India salt islands ; nor ports or places on the west coast of America, north of Benicia, during the period insured ; nor to use the Min river, nor Torres Straits."

The vessel sailed September 20, 1864, from Boston, bound for Lingan, in the island of Cape Breton, Nova Scotia, one of the British North American provinces, for the purpose of taking in a cargo of coal. She was lost on the voyage, within sight of Louisburgh light on the Island of Cape Breton, and about fifty miles from Lingan. A verdict for plaintiff was set aside at general term, and a new trial ordered. Plaintiffs appealed to this court.

Richard H. Huntley, for appellants.

David Dudley Field, for respondent.

HUNT, C. Warranties must be strictly and perfectly complied with. Phil. on Ins., § 762. It is not enough that they be substantially complied with. Id. The compliance must be full and complete, though not necessarily literal. Id., §§ 762, 766. Mr. Justice KENT said, in *Kemble v. Rhinelanders*, 3 Johns. Cas. 130, that "a warranty must be literally complied with, but this strict compliance ought to operate in favor of as well as against the assured whenever he can bring himself within the terms of it." In the case of a warranty that "the ship should have twenty guns," and she had, in fact, twenty-two guns, but only twenty-five men, a number short of the necessary complement for twenty guns, there being no ground to impute fraud, Lord MANSFIELD held this to be a compliance with

the warranty, and that the assured was entitled to recover. *Hyde v. Bruce*, Marsh. 347; 3 Dougl. 213, cited; 1 Phil. on Ins., § 767.

That the assured have literally complied with and kept their warranty in this case can scarcely be doubted. A vessel cannot be said to have used a particular port when it is conceded that she has not been within fifty miles of it.

"To use," means to employ, to hold, to occupy, to enjoy, or take the benefit of, as a chair, a book, or possess a harbor. In connection with the word "port," it means to go into a harbor or haven for shelter, for commerce or for pleasure, and to derive a benefit or an advantage from its protection. Going near a harbor or port, sailing past or going in the direction of it, is not a use of the port. Certain ports, it is declared in the warranty, shall not be used, as those on the continent of Europe, north of Hamburg, nor ports in the British North American provinces, except at certain dates, nor the West India Islands at certain dates, nor certain ports of Texas, etc. That this exclusion refers to places specifically, and not to the regions adjacent, is evident, from the fact that, as to Navarino in the Mediterranean, the exclusion is directed in form to the region as distinguished from the port. It is stipulated in that case, without reference to ports or places, that the vessel shall not "go east of Navarino in the Mediterranean during the period insured." If the vessel shall go east of that port, whether she enters any or all the ports thereabouts, or returns, having entered no port, the warranty is broken. As to Texas, again, the warranty is peculiar, "not to use ports and places in Texas except Galveston." The region is not excluded. One port is not excluded. All other ports are excluded, and the entry into any one of them, except Galveston, would constitute a breach of the warranty. The distinction between traversing a region and entering into a port or harbor in the region, was evidently in the view of the contracting parties. This is an answer to the argument "that it was the clear intent of the underwriter, in this restriction, to guard against the danger which arises from navigating near the coast of the British provinces at certain seasons of the year." The language is singularly unfortunate to embrace such a proposition. It imports that, in certain latitudes, the regions were, themselves, deemed to be dangerous, and that the vessel must not enter those regions; that in other latitudes the underwriters had no fears of the region, provided the dangers of using certain harbors or ports were avoided. To meet the case, cer-

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tain ports in the north of Europe and on the British North American coasts are excluded, the region being open for use, while in the Mediterranean and in the Gulf certain regions must not be entered by the vessel.

The defendant insists again that an intention to enter the prohibited port creates a breach of the warranty. I cannot concur in this argument. No authority is cited to sustain it, and it is against all principle. In the matter of performing contracts, except on some nice points of deviation, the intention is not usually important. It is the act or fact by which the result is determined. A man may determine to violate his contract or to defraud his neighbor a thousand times, and in a thousand ways, and yet not place himself within the reach of the law. He may perform his contract when he intends to violate it. If his acts are right, a secret bad intent cannot injure him; nor, if his acts are wrong, can a good intent save him. If the assured intended to go to some other port in Texas than Galveston, but in fact went directly to Galveston, and the vessel was lost while in that port, there would be no breach of her warranty. But if her master voluntarily carried his vessel east of Navarino in the Mediterranean, although he did not intend to go east of that port, and did not know that he had done so, his warranty would be broken. In such case, the fact, and not the intent, to keep the warranty or to violate it gives the legal character to the transaction. 2 Pars. Mar. Law, ch. 3, § 1. When the question is one of deviation, the point of when and where the departure commences may be important. The point here is upon the warranty not to enter a certain port, and is not a question of deviation.

The case of *Stevens v. The Com. M. Ins. Co.*, 26 N. Y. 397, is cited by the respondent. In that case the vessel was "warranted not to use ports or places in Texas, except Galveston, nor in the Gulf of Mexico." Permission was afterward given "to use the port of Laguna for her voyage, without prejudice to this insurance." The vessel arrived at Laguna, but did not enter that port. It not being a port of entry, the custom-house officers would not permit the entry. She then sailed for Sisal, for the purpose of paying the duties, and intending to return to Laguna for her cargo. At Sisal she went ashore and was lost. The court of appeals held that the entry at Sisal was not justified, and that the warranty was broken. I should say that the real question in that case was whether the permission to enter the port of Laguna carried with it the power to

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take all measures necessary to effect that purpose, or whether the permission was to be literally construed. At any rate, the case bears no analogy to the one we are considering.

In my opinion there was no breach of warranty by the assured. The order of the general term should be reversed, and the plaintiffs should have judgment on the verdict, with costs.

EARL, C., delivered a concurring opinion.

Order reversed, and judgment for plaintiffs.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

STATE *ex rel.* COONS V. THE JUDGE OF THE THIRTEENTH JUDICIAL DISTRICT.

(28 La. An. 20.)

Transfer of cause to federal court.

The application of a party to remove a cause to the circuit court of the United States is analogous to a plea to the jurisdiction of the State court, and, when granted, the party against whom it is taken has the right to appeal. The case would be different if the application to remove is refused. In the latter case no irreparable injury would follow, and the appeal would not be allowed. (See note, 7 Am. Rep. 507.)

A mandamus will therefore issue, on application from the supreme court directing the judge of the district court to grant an appeal from an order transferring a cause to the circuit court of the United States, if the case is in other respects appealable.

APPLICATION for mandamus.

Thomas P. Farrar, for relator.

A. N. & H. N. Ogden, of counsel for the judge.

HOWE, J. The case of *Martin Cobb & Co. v. Coons* was commenced in February, 1867, in the district court of Madison parish.

State v. The Judge of the Thirteenth Judicial District.

On the 16th day of May, 1870, Thomas J. Martin filed a petition, verified by his affidavit, stating that he is one of the plaintiffs; that he is sole owner of the claims in suit; that he *resides* in the State of Kentucky, and that he has reason to believe, and does believe, that from local influence and prejudice he will not be able to obtain justice in this (the district) court. He prayed that the cause might be removed to the circuit court of the United States, under the provisions of the act of congress of March 2, 1867. His co-plaintiffs did not join in this request, nor did he state that he or they are *citizens* of any other State than Louisiana. 18 How. 137.

The judge granted the order of removal, and, on the day following, the defendant Coons applied for a suspensive appeal, which was refused, and thereupon a mandamus was applied for.

We had occasion to say, in the case of *Rosenfield v. The Adams Express Company*, 21 An. 233, that an application to remove is analogous to a plea to the jurisdiction, and that, if granted, an appeal would lie. The remark was, perhaps, not entirely necessary to the decision of that case, but we do not find any reason, on the most careful examination, to doubt its correctness.

In *Beebe v. Armstrong*, 11 Martin, 440, this court entertained such an appeal, and reversed the order of removal. In *Duncan v. Hampton*, 12 Martin, 92, a similar appeal was entertained, and the question of the right of appeal seems to have been discussed; for, alluding to a difference of opinion on the merits, Judge MATTHEWS said: "As we are unanimously of opinion that the judgment (of removal) rendered by the district court is a decision from which an appeal ought to be sustained, it is unnecessary to investigate *that part of the cause*." Judge MARTIN was in favor, on the merits, of reversing the order of removal. There are three cases where similar appeals were entertained: *Louisiana State Bank v. Morgan*, 4 N. S. 344; *Fitz v. Hayden*, id. 653; and *Fisk v. Fisk*, id. 676. In the first of these the order of removal was reversed. In *Higgins v. McMicken*, 6 N. S. 712, the court declared that it had several times entertained jurisdiction of such appeals, and added:

"Such decisions or judgments were properly considered as final, in consequence of sustaining the petitions for removal. A request to change the jurisdiction of a suit from a State court to one of the United States, under the law of congress, is analogous to a plea to the jurisdiction of the court in which the proceedings commenced;

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and when a removal is ordered, the plaintiff would be without remedy against such order, unless by appeal."

In *Stoker v. Leavenworth*, 7 La. 390, a similar appeal was entertained, and the "judgment" of removal affirmed; and the same action was had in *Franciscus v. Surget*, 6 Rob. 33.

We cannot undertake to disturb this well-settled jurisprudence.

It is therefore ordered that the mandamus issued herein be made peremptory.

 SOUTHERN DRY DOCK CO., appellant, v. STEAMBOAT J. D. PERRY,
CAPTAIN BAIRD AND OWNERS.

(23 La. An. 39.)

Jurisdiction — proceedings to enforce claim against vessel.

A proceeding by attachment or provisional seizure, when taken out against a vessel belonging to a port of one State, while lying in a port of another State, to enforce a claim for repairs and materials furnished at the latter port, is a proceeding *in rem* or in admiralty, and the State courts are without jurisdiction, notwithstanding an act of the legislature authorizing such a proceeding. But in such a case, where the master has also been personally cited and is sought to be made liable in his individual capacity, the State courts, although without jurisdiction to proceed *in rem* by provisional seizure, have jurisdiction of personal action.

APPEAL from fifth district court, parish of Orleans. The opinion states the case.

Bentnick Egan, for appellant.

Given Campbell, for appellees.

HOWE, J. The petition of plaintiff alleged "that Capt. A. Baird and the owners of the steamboat J. D. Perry, a boat engaged in carrying freight and passengers for hire," were indebted to petitioner *in solido*, in the sum of \$1,029.30, for work and materials furnished in making repairs to the said steamboat; and after claiming a *privilege on the vessel*, they prayed that a writ of provisional seizure might

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issue against her, and that Capt. Baird and the owners might be cited and condemned to pay the plaintiff the sum claimed with interest, "*and with privilege on the steamboat J. D. Perry.*"

The writ was issued and the vessel seized. Baird was cited as captain, to answer the petition, and an answer was filed in the form of a general denial by "the defendants." A supplemental petition was afterward filed by the plaintiff, averring that Baird was sole owner. No *contestatio litis* was formed on this, but as evidence was offered and received, without objection, to prove the ownership by Baird, we will consider the case as if the vessel was the property of Baird, the personal defendant.

A peremptory exception was filed on behalf of the defendants, generally, to the jurisdiction of the court, on the ground that the proceeding was one *in rem* to enforce an admiralty claim against the vessel for repairs and materials. A rule was also taken to set aside the writ of personal seizure for the same reason, and the exception and rule and the merits were tied together. The court maintained the exceptions and dismissed the suit, and the plaintiff appealed.

From the manner in which the case has been conducted, it becomes necessary to consider it in two aspects: First, as to the validity of the writ of provisional seizure (and this must depend on the original petition and affidavit); and second, as to the right to a personal judgment against Baird.

1. The question of validity of the writ of personal seizure, considered from the point of view of the original petition and affidavit, is one that has been fruitful of discussion in the State and national tribunals. By section 2 of article 3 of the constitution of the United States, it is provided that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction; and, in execution of this broad provision, it is declared by the act of congress of September 24, 1789, that the district courts of the United States "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." The wisdom of these provisions is apparent, yet no one familiar with the subject can have failed to observe a constant tendency to evade or infringe them, and in every commercial city of our sea-coast the ships and vessels of other States and nations have been repeatedly subjected to annoyance in violation of these salutary rules.

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The supreme court of the United States, whose rulings on this subject are necessarily of highest authority, has had occasion recently to condemn this increasing abuse and to formulate the true doctrine in the premises. In the case of *The Moses Taylor*, 4 Wall. 411, the court said:

"The distinguishing and characteristic feature of such suit" (*in rem* in the admiralty), "is, that the vessel or thing proceeded against is itself seized and impleaded, as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself, which gives to the title, made under its decrees, validity against all the world. By the common-law process, whether of *mesne* attachment or execution, property is reached *only* through a personal defendant, and then only to the extent of his title. Under the sale, therefore, upon a judgment in a common-law proceeding, the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold. The statute of California, to the extent in which it authorizes actions *in rem* against vessels for causes of action cognizable in the admiralty, invests her courts with admiralty jurisdiction."

And to this extent the statute was declared to be void.

In the case of *The Hine*, 4 Wall. 555, the same tribunal, in declaring the nullity of a statute of the State of Iowa, by which suits substantially *in rem* against vessels, for causes cognizable in the admiralty, were authorized, and alluding to the clause of the act of 1789, which saves to suitors "the right of a common-law remedy where the common law is competent to give it," said:

"It could not have been the intention of congress, by the exception in that section, to give the suitor all such *remedies* as might afterward be enacted by State statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases by simply providing a statutory remedy for all cases. Thus, the exclusive jurisdiction of the federal courts would be defeated."

In the case of *The Belfast*, 7 Wall. 624, the same court held language which is especially applicable to the case at bar. Alluding again to the "common-law remedy," which is saved to the suitor and which is now urged before us as a justification for the issuance of the writ of provisional seizure in the present suit, it said:

"Proceedings, in a suit at common law, on a contract of affreightment, are precisely the same as in suits on contracts not regarded as

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maritime, wholly irrespective of the fact that the injured party might have sought redress in the admiralty. When properly brought, the suit is against the owners of the vessel, and, in the States where there are attachment laws, the plaintiff may attach any property not exempted from execution belonging to the defendant. * * *

Liability of the owners of the vessel under the contract being the foundation of the suit, nothing can finally be held under the attachment, *except the interest of the owner* in the vessel, because the vessel is held, under the attachment, as the property of the defendant and not as the offending *thing*, as in the case of a proceeding *in rem* to enforce a maritime lien."

It is apparent then, that our State courts can have no power to enforce, by proceedings *in rem*, an admiralty lien against a vessel. They may seize and hold, for final judgment, the interest of a personal defendant *in a vessel*, in proper cases, by any writ addressed to such interest alone. The name of the writ is unimportant. It is commonly called "attachment;" such is its name in this State; but by any other name it would have as great validity, and the principal question in the case at bar, which we find it necessary to decide, is, whether the writ of provisional seizure could lawfully issue. We are of opinion that it could not.

The privilege thus sought to be enforced is an admiralty lien — the lien of a material man — for work and materials furnished in New Orleans to a foreign vessel, which came hither from the Ohio river and was bound to White river, in Arkansas. The cases cited by plaintiff against this position are not in point, for there is a wide difference in legal necessity between work done in building a vessel on shore, at the place of her nativity, and work and materials furnished by way of repairs in a foreign port. The former has not, the latter have, an admiralty lien. The privilege springs from the nature of the debt, and the writ of provisional seizure by which it is sought to be enforced, grasps the thing itself, and not merely the interest of some person or persons in the thing. If enforced by judgment, "with privilege," as prayed for in the original petition in this case, there would be sold, not the interest of Baird, for it is not alleged that he has any, or of any other person, but the vessel herself, her tackle, apparel and furniture, free and clear of all titles, interests, mortgages, privileges and other incumbrances, the claims of the whole world being transferred to the fund realized. We can see no practical difference in origin, progress and result between the

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operations of such a writ and those of admiralty process. It goes as far and strikes as deeply.

It is urged that the writ of provisional seizure in this case is a "conservatory act" merely, and not liable to the objection of infringing the admiralty jurisdiction. It is true that the writ is conservatory, but so also is the admiralty process which issues upon the filing of a libel, being provisional merely and falling to the ground if the libellant does not establish a case, or if the claimant establishes a defense. The objects of the two writs are identical; both are issued upon the allegation of a privilege, upon a mere affidavit and without bond in favor of the owner of the thing seized. So far as the writ of provisional seizure and the prayer for the enforcement of the privilege, in this case, are concerned, the action is *in rem*, against the object seized, its true ownership being of no moment. That object being a vessel and the privilege a maritime lien, we have, enfolded in the suit, a proceeding which is, in reality, an admiralty proceeding, and the fact that the plaintiff asked, also, for a personal judgment against Baird, cannot divert our attention from the fact that he has asked for judgment *in rem* against the vessel described as the property of *some one else*.

The original petition of the plaintiff, with a few changes of terminology, would be a libel in admiralty, and its prayer does not differ substantially from that of a libel in which the actions *in rem* against the vessel and *in personam* against the master are joined. To sustain the writ of provisional seizure and a consequent judgment against the vessel for the privilege alleged, would be, by indirection at least, to infringe the exclusive jurisdiction of the courts of the United States.

2. But, as the pleadings stand, a personal action also is instituted against Baird, and we think the judge *a quo* went too far in dismissing the entire suit. The writ of provisional seizure was properly set aside, for the petition and affidavit on which it was asked for did not authorize its issuance. But there is evidence enough to justify a personal judgment against Baird who was duly cited.

It is, therefore, ordered and adjudged that the judgment appealed from be reversed. It is further ordered that the writ of provisional seizure issued herein be quashed, with costs thereof; that the plaintiff have judgment against the defendant, A. Baird, for the sum of \$1,029.30, with legal interest from January 2, 1867, and other costs of the lower court; and that the appellees pay the costs of appeal.

Judgment accordingly.

CASE, Receiver, v. HENDERSON, appellants.

(33 La. An. 49.)

Bank check — set-off.

The holder of a check drawn by a third party on a bank cannot offset such check against his note held by the bank. There is no privity of contract between the holder of such a check and the bank, and a refusal to pay the check would not give the holder a right of action against the bank.

ACTION on a promissory note. The opinion states the case.

Breaux & Fenner, for appellants.

J. D. Rouse, for appellee.

HOWELL, J. This is an action on a note by the receiver of the First National Bank of New Orleans against the maker and indorser, to which the plea of compensation is opposed, and is based on a check drawn on the bank by a third party, in favor of and presented by the maker, but payment thereof refused.

The first question is, did this refusal give the holder a right of action against the bank on the check? This question is answered in the negative by the United States supreme court, in the case of *The National Bank of the Republic v. R. J. Millard*, No. 211, December term, 1869, where it was fully examined and authorities cited. It was succinctly said: The right of the depositor is a *chose* in action, and his check does not transfer the debt or give a lien upon it to a third person, without the assent of the depository; there is no privity of contract between the holder of the check and the bank or depository, and without this there is no foundation for an action by the former against the latter. See 2 Seld. 412; 5 Bosw. 341; 21 Wend. 373; Byles on Bills, ch. "Check on Banker." This principle is recognized in *Poydras v. Delamare*, 13 La. 98.

The defendants, then, as holders of the check, having no right of action against the plaintiff, cannot compensate his debt therewith, because it is not equally demandable. O. C. 2205; 8 An. 617; 7 La. 564; 7 N. S. 517.

Judgment affirmed.

McLaren & Co. v. Kehler.

McLAREN & Co. v. KEHLER, appellant.

(18 La. An. 30.)

Constitutional law — how far judgment of another State conclusive

The courts of the State in which a judgment of a court of another State is sought to be enforced have a right to inquire how far the judgment presented may be conclusive in the State in which it was rendered. And in determining this question the courts of this State will require that the whole record of the proceedings be produced under which the judgment was obtained, in order to show how far it may be conclusive.

If a judgment of the inferior jurisdiction of another State has been appealed, and the supreme court has pronounced a final judgment thereon, and the judgment or demand passed upon is sought to be enforced in this State, the record or proceedings of the supreme court, being the final judgment in the cause, is the proper transcript to present to enable the courts of this State to ascertain how far it is conclusive in the State where it was rendered.

APPEAL from the fifth district court, parish of Orleans.

R. H. Marr, for plaintiff and appellee.

E. Wooldridge, for defendant and appellant.

TALIAFERRO, J. This is a suit to enforce a judgment rendered by the circuit court of the second judicial circuit of the State of Wisconsin, sitting for the county of Milwaukee. By that judgment the defendant was condemned to pay the plaintiff the sum of \$1,445.59 and costs. The defense is, that, at the time of the institution of the suit and the issuing of the summons therein, in the county of Milwaukee, State of Wisconsin, the defendant was not a resident of the State of Wisconsin, but was then, and had been long before, a resident of the State of Louisiana, where he has constantly resided ever since, having established his domicile in the last-named State prior to the issuing of the summons and the institution of the said suit. The defendant avers that no summons in that case was ever served upon him; that no appearance in his behalf was made by himself or by any person authorized by him. He denies any indebtedness whatever to the plaintiff, and prays judgment in his favor. The court below rendered judgment in favor of plaintiff, and the defendant has appealed.

The facts, as we find them in the record, seem to be that suit was brought against the defendant in Milwaukee county, in the State of Wisconsin, and that the citation was served at the residence of defendant's father-in-law, in Racine county, by delivering a copy of the citation to the defendant's wife; this service was made on the 14th of August, 1865. This citation, it seems, was sent to Jenkins, who had long been the attorney at law of the defendant during his residence in Wisconsin. Jenkins was served with a copy of the petition on the 22d of September following, and on the 11th of October obtained an extension of twenty days to answer. During this delay the attorney drew up an answer and mailed it to defendant at New Orleans. Jenkins stated that he was informed by defendant that he never received the answer to be verified; in consequence, judgment was rendered against the defendant on the 16th of February, 1866. The suit to enforce the judgment in Louisiana was filed on the 22d of November, 1866, and judgment rendered on it on the 15th of February, 1869. Pending this suit in Louisiana, the defendant commenced an action in Wisconsin for the purpose of opening the judgment there, in order to enable him to answer and set up the plea of change of domicile and want of citation. This proceeding was commenced in Milwaukee in February, 1867. Jenkins, the defendant's attorney, upon his own affidavit of his ignorance of the defendant's removal from Wisconsin, and that his having appeared for defendant was predicated upon the belief that defendant was only temporarily absent, and upon the defendant's affidavit, obtained an order for opening the judgment to enable the defendant to answer. From this order of the circuit court the plaintiff appealed to the supreme court of Wisconsin, and obtained a reversal of the order. The final decree of that court reversing the order of the circuit court was returned and filed in the circuit court on the 17th of January, 1868.

A duly certified copy of this decree was introduced in evidence on the trial of the case in the court below. Its introduction was objected to by the defendant, on the ground that the filing of the record of the supreme court of Wisconsin was a change in the nature of the demand. The evidence was properly admitted. The ground taken by the defendant was, that the judgment sued on was not conclusive upon the defendant; evidence, therefore, to show that it was conclusive was fairly admissible.

The first section of the fourth article of the constitution of the

United States directs that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." A compliance with this provision of the supreme law requires that each State shall give the same effect within its own limits to the judicial decrees of every other State, which such decrees have in the States where they are rendered. Then it follows that a judgment, final and conclusive in one State, must be so in every other State. A judgment without effect in the State where it is rendered, is without effect in any other State. The courts of the State in which it is sought to enforce a judgment rendered in another State, have the right to inquire how far the judgment presented may be conclusive in the State in which it was rendered. This doctrine has often been announced by this court. In the case of *Hockaday v. Skeggs*, 18 An. 682, the rule was repeated in these words: "It has been settled by frequent decisions of this court that, in order to enable the courts of this State to give effect here to a judgment rendered in another State, the whole record of the proceedings under which the judgment was obtained must be produced in order to show how far it may be conclusive. The transcript must show that the proceedings are clothed with the forms necessary to the validity of a judgment in the State from which it comes. It must also show that the defendant had due notice, or that he actually appeared."

The defendant aims to show that he had changed his domicile from Wisconsin to Louisiana at a time anterior to the institution of the suit against him in Wisconsin, and that he had no notice of the proceedings.

The testimony of several witnesses was taken under commission and introduced upon the trial. It is, to some extent, contradictory as to the last place of residence of the defendant in Wisconsin.

But a question of grave import here arises. We have seen that, within two months from the date of the filing of the suit in Louisiana to enforce the Wisconsin judgment, the defendant repaired to that State and set up the same defense there against the judgment which he used here. His own affidavit and that of his attorney were introduced to sustain his pleas of want of domicile and want of citation. The circuit court did not vacate the judgment, but rendered this order: "It is ordered that the defendant have leave to file his answer on payment of ten dollars costs, and the judgment now entered remain and abide the event." The appeal was taken

from the whole order, and it was reversed by the appellate court in January, 1868, more than one year before the rendition of the judgment against the defendant in the Louisiana court. It appears then that the grounds upon which the defendant defended in the circuit court of Wisconsin, to set aside the judgment, were reversed by the supreme court of that State; the affidavits we have referred to were examined and passed upon by that court, and it decided that the defendant had received notice in the original proceedings, and was of opinion that he showed no case of surprise, mistake or excusable neglect, and nothing which could appeal to the discretion of the court below. It held that "it was an abuse of discretion to let him in to answer.

If this judgment is conclusive against the defendant in Wisconsin, it is equally conclusive in Louisiana. The courts of this State are estopped from all inquiry into its correctness, and are precluded from considering the issues raised by the defendant, and which, by the judgment of the supreme court of Wisconsin, have become *res judicata*. We think the position of the defendant's counsel in regard to the admission in evidence of the transcript of the decree of the supreme court of Wisconsin not well taken. The judgment of the circuit court, made final on appeal, was merged in that of the appellate tribunal. There was, at the time of the trial of this case in the fifth district court, but the one judgment for the defendant to combat, and he had to oppose it in the character and force it had assumed by his own proceedings. We are of the opinion that the judgment of the lower court should be sustained.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Rehearing refused.

Pereuilhet v. Hautho.

Succession of PEREUILHET — On opposition of **Mrs. HAUTHO**,
appellant.

(28 La. An. 294.)

Contract — implied to compensate for services.

Services rendered a person during his last illness as nurse and housekeeper are not deemed to be gratuitous, but, on the contrary, there is an implied contract that the party receiving such services is to pay a fair compensation therefor. The fact, if it were shown, that the nurse or housekeeper lived with the man she was nursing and taking care of as his concubine does not impair or lessen her claim for wages, unless it be alleged and shown that concubinage was the motive and cause of their living together in the first instance, and the services rendered were merely incidental to that mode of living.

APPEAL from the second district court, parish of Orleans.

G. Schmidt, for opponent and appellant.

Edward C. Guillet, for curator and appellee.

HOWE, J. The opponent claimed \$2,875 for services as house servant and nurse. Her claim having been rejected, she has appealed.

The record shows that the deceased was a bachelor of some means, and that the opponent, with her children, resided in the house with him some years prior to his death, which occurred July 4, 1867. He kept no other servant, and had no other nurse. The opponent kept house, did the marketing, cooking and housework, and for some months prior to his death nursed him night and day. He died of consumption; his disease was distressing and protracted, and he was an exacting patient. The opponent was assisted by her daughter, fifteen years old, and her son, a boy of twelve. One of the attending physicians speaks in great praise of the patience and assiduity with which she performed her duties of nurse, and concludes:

"I cannot estimate the value of the services rendered so delicately, and rendered in circumstances requiring so much patience. I can only state that, if I were placed in the same circumstances, the probability is that I would leave to the person who had thus comforted

me in my last days all that I possessed of worldly goods, and my blessing as a true Christian."

We think it well settled that services rendered under circumstances like these will not be deemed to be gratuitous. No one is readily presumed to give such useful and tedious labors except under a *quasi* contract for a fair compensation. "It must be remembered," as this court said in *Camfranc v. Pilié*, 1 An. 198, "that, according to the elevated morality of the civil law, no one ought to enrich himself at the expense of another, and that where a party calls upon another to do a thing, the law, in the absence of contrary proof, supposes an obligation to pay for what is done. For actions without words, either written or spoken, are presumptive evidence of a contract, where they are done under circumstances that naturally imply a consent to such a contract.

It is clear, from the record in this case, that the estate of Pereuilhet was considerably enriched by the industry and the patient care of the opponent. If he had hired other servants and nurses, the amount coming to the heirs who now resist her claim would have been considerably reduced.

We gather from the record, as a whole, a *quasi* contract on the part of the deceased to compensate the opponent for the services mentioned.

In their answer to the opposition, the appellees made the following allegation: "That said Doria Hautho, for several years next preceding the death of P. Pereuilhet, lived with him as his concubine, and was so living with him at the time of his death;" and some testimony on this subject was introduced.

In the first place, the evidence on this point does not make the truth of this averment very clear; and, in the second place, if it did, the fact as alleged would not, in itself, vitiate the claim of opponent. An employer cannot pay off a female employee by robbing her of her virtue. Such a method of extinguishing an obligation is not known to the law. If concubinage had been alleged and proved to have been the motive and cause of the parties living together in the same house in the first instance, and the services in question to have been merely incidental to such a state of living, our conclusion might have been different; but such is not the allegation, much less the proof; and we certainly will not presume that such was the fact.

In *Vieus v. Brickle*, 8 M. 7, where concubinage, though proved, did not appear to have been the motive of the association out of

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which the claim arose, the court, MARTIN, J., said: "We cannot view this circumstance as preventing or destroying any right which she may have on the defendant for a remuneration, and perhaps it increases his obligation, in a moral point of view, of doing her justice, instead of lessening it in a legal."

We think the opponent entitled to recover, and we fix the amount at \$900, with interest from judicial demand.

It is therefore ordered that the judgment appealed from be avoided and reversed; that the opposition of Mrs. Doria Hantho be maintained for the sum of nine hundred dollars, with interest from December 17, 1867; that the tableau be amended by placing her as a creditor thereon for the said sum, and that the appellees pay the costs of both courts.

Rehearing refused.

DE FERJET V. BANK OF AMERICA.

(28 La. An. 310.)

Forgery — ratification of by conduct.

In this case, the evidence shows that plaintiff kept a bank account with defendant; that the book-keeper of plaintiff kept the cash account, made the deposits, etc., and that his relations toward the plaintiff were well understood in the bank; that the book-keeper of plaintiff drew a check on the bank for \$2,500, to which he forged plaintiff's signature, which was an amount above the account to the credit of plaintiff in the bank; that notice was given by the bank that plaintiff had overdrawn his account, who, on being shown the check for \$2,500, said he had not signed it, but did not say that it was a forgery. On seeing his book-keeper, he reported back to the bank that it was all right. Subsequently the book-keeper drew another check on the bank for \$1,700, and again forged the signature of the plaintiff thereto, which the bank paid on presentation. On discovering the second forgery by the book-keeper, six months after the first, plaintiff denounced the act.

Held, that the act of the plaintiff, in ratifying the first act of forgery made by his book-keeper, exonerated the bank from all liability for having paid it; that his afterward keeping the book-keeper in his confidential employ misled the bank and threw it off its guard; that, having approved and ratified the first forgery, the bank was excused for paying subsequent checks similarly drawn; that the plaintiff had by his own acts caused the injury, and he must therefore bear the loss.

APPEAL from the fourth district court, parish of Orleans.

A. Robert, for plaintiff and appellee.

Johnson & Dennis, for defendant and appellant.

HOWELL, J. Plaintiff claims \$2,425.41 as the balance due him on deposit. The defendant denies any indebtedness, and avers that plaintiff has overdrawn his account to the amount of \$1,774.59, as shown by his checks, which sum is claimed in reconvention. To this demand plaintiff answers, denying the genuineness of his signature to two of said checks, one for \$2,500, dated and paid on the 31st December, 1867, and one for \$1,700, dated 4th and paid 6th January, 1868.

There is no contest before us as to the forgery of those two checks; but defendant and appellant contends that plaintiff, by his conduct in the premises, has justified the bank in receiving and paying them as genuine, and therefore is liable for the amount so overdrawn. When the first of these checks was paid, an overdraft was discovered and immediately reported to plaintiff, who expressed great surprise, and stated that he had drawn no check on that day. Upon going to the bank to investigate the matter, he was told that it was all right, the check had been made good by a deposit. The check was handed to him, and after being carefully examined by him was returned without any remark, as the bank clerk testifies, but he says he stated it had not been signed by him. On his way back to his office he met his book-keeper, who had the sole charge of his bank account and cash, told him of the discovery he had made that the latter (the book-keeper) had counterfeited his signature to the check for \$2,500, and asked him if that was the only loss he would sustain, and on being assured it was, he determined to bear it, and not expose the matter, and continued the book-keeper in his employment as before, until about the 6th or 7th of January following, when he discovered and denounced the forgery of the check for \$1,700. The signature to each was in the handwriting of the book-keeper, who, to provide for them, deposited to plaintiff's credit certain checks drawn to the order of plaintiff by a young clerk of the latter on other banks, and indorsed thus: "For deposit, G. De Feriet, per E. Davenport," the book-keeper. The first of these deposits, made of 31st of December, 1867, was realized, and pro-

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duced a surplus, which was drawn on by several genuine checks of the plaintiff. The check forming the second deposit was returned dishonored, thus producing the overdraft claimed in reconvention.

Under these circumstances, it is clear that the plaintiff cannot be heard to disavow the check for \$2,500. The case of *Etting v. Commercial Bank*, 7 R. 459, rests on very different facts. So far as was in his power, he condoned this offense of his book-keeper, and made the transaction his own. He could but have known that the deposit made to cover this overdraft was not made with his funds, and that consequently the payment of said check resulted in no injury or loss to him, but that really his balance was increased by the said deposit, out of which his subsequent checks were paid. The only point upon which any doubt can be raised is, whether he is liable for the overdraft resulting from the payment of the second forged check.

In the case of *Duconge v. Forgay*, it was held that an authorization to indorse other promissory notes cannot be inferred from the fact that the party whose name was forged on them did not publicly denounce the forgery which first came to his knowledge, nor will the neglect to denounce the crime to the public authorities make such party responsible for other forgeries of his name, then unknown to him, or give rise to an action for damages under articles 2294 and 2295, C. C. But here the plaintiff is sought to be made liable, not simply for his failure to denounce the forgery to the public authorities when brought to his knowledge, but because by his words and acts he threw the bank off its guard and enabled the guilty person to repeat the fraud upon the same party. In the case of *Forgay*, the forger was a friendly acquaintance, but not in his employment, and rather than expose his friend, he guaranteed the payment to the holder of the forged indorsement first made known to him; but when sued by another and different party on another forged indorsement, he was relieved from liability on the principle above stated. In this case, however, the forger was the confidential clerk of plaintiff, had charge of his bank book, made deposits and kept his cash and bank accounts; when plaintiff discovered the first forgery he used ambiguous language to the bank officer, continued the forger in the same confidential position, sanctioned the deposit made to meet the forged check, drew upon the surplus remaining after replacing the overdraft, and thus relieved the bank from the charge of imprudence in paying a subsequent check similarly signed. Indeed, a careful examination of the evidence will leave a well-founded doubt

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as to whether the bank was made aware that the check for \$2,500 was actually a forgery until after the payment of the one for \$1,700. The only direct evidence on this point is the statement of plaintiff himself, when called to the stand the second time, that, upon returning said check to the bank clerk, he remarked it had not been signed by him, and his first declaration, before going to the bank, that he had drawn no check that day. The officers of the bank may have inferred that, although not signed by the plaintiff himself, he did not consider it a forgery. Be this as it may, we are led to the conclusion that the peculiar facts and circumstances of this case, taken together, must relieve the bank from the stringent rule that the depository must take care to pay none but the checks or drafts of the depositor himself or his acknowledged special agent, and that this is a proper case to apply the equitable principle that, where one of two innocent parties must suffer, it should be he who was the cause or occasion of the confidence and consequent injury of the other.

It is, therefore, ordered that the judgment appealed from be reversed, and that defendant recover of plaintiff the sum of \$1,774.59, with legal interest from 6th of January, 1868, and costs in both courts

Rehearing refused.

DITTMER & PELLE V. GERMANIA INSURANCE COMPANY OF NEW ORLEANS.

(33 La. An. 455.)

Fire insurance — increase of risk avoids the policy.

The provision in a policy of insurance against an increase of risk by acts of the insured is an independent condition of itself, and is not to be controlled or limited by the previous conditions or specifications of the hazards. Therefore, an act done by the assured, although not included in the class of specified hazards, nevertheless avoids the policy if it increases the risk.

In this case the assured allowed a lot of loose and unbaled hay to be stored in the upper part of the building insured, without giving notice to the insurers. *Held*, that, although unbaled hay was not specially excepted from the hazards, yet, from its very nature, the risk was increased, and, therefore, it avoided the policy on that ground.

Dittmer & Pelle v. Germania Insurance Co. of New Orleans.

APPEAL from the fourth district court, parish of Orleans.

E. Howard McCaleb, for plaintiffs and appellants.

J. M. Dirrhammer and *C. E. Schmidt*, for defendant and appellee.

TALIAFERRO, J. Dittmer insured, to the amount of \$2,000, his stock of groceries, wines and liquors, and to the extent of \$500 on his fixtures and furniture, all contained in a frame shingle building in the town of Carrollton. Eight months afterward the premises were entirely destroyed by fire, causing the total loss of his stock in trade, furniture, etc., which, as alleged, were worth, at the time the fire occurred, over \$2,500. The defendants, being the insurers, were sued on the policy of insurance for \$2,500, with interest, etc.

The defense is, that Dittmer, after he had effected the insurance, stored in the premises a quantity of unbaled hay, and kept it there until the fire, thereby acting in bad faith, and materially increasing the risk of the defendants, in violation of the contract by which he was insured, rendering, according to its conditions, the policy null and void.

The defendants had judgment in the court below, and the plaintiffs have appealed.

It is in proof that, after the policy was taken out, Dittmer, the plaintiff, permitted one of his neighbors to store within the insured premises a large quantity of loose, unbaled hay. It seems to have been put in the upper story of the building insured, and to have been placed there about three months before the fire occurred. The witness Lieble, who owned it, says that there were about four thousand pounds of the hay in the building at the time of the fire, and that it was perfectly dry. The plaintiff contends that, as "hay pressed in bales" is expressly named and classed as hazardous, and excepted in the conditions annexed to the policy, and unbaled or loose hay not being so classed and specified, it cannot be considered as excepted, and that the policy is not thereby void. An express condition stipulated by the insurers is, that the plaintiff should not in any manner increase the danger and risk of fire on his premises during the continuance of the policy. The insurance company was not informed of the storing of the hay in the building insured, and no application was made for the assent of the company to its being so stored, and no opportunity offered the insurers to require, as a condition for continuing the policy in force, a higher or increased premium.

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We think the doctrine contended for on the part of the plaintiff is not maintained. We think it an established rule that the provision in a policy of insurance against an increase of risk by acts of the assured is an independent condition of itself, and is not to be controlled or limited by the previous condition or specification of hazards. Therefore, if the act done by the assured, although not included in the class of specified hazards, it nevertheless avoids the policy if it increases the risk. 1 Strob. (S. C.) 281; 10 Pick. 535; 2 Comst. 210; 53 Penn. 353.

That the risk was increased in this case by the storing a large quantity of loose, dry hay in the building insured, we think can admit of no doubt. If hay pressed in bales be excepted as hazardous, for the reason that it is easy to ignite, *a fortiori*, hay in the loose, unbaled state would be far more so from the rapidity with which incandescence and flame would be developed by ignition. We think the defense is sustained, and that the judgment should be affirmed.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Rehearing refused.

THE LOUISIANA STATE LOTTERY COMPANY V. RICHOUX.

(23 La. An. 748.)

Extrinsic evidence not admissible to invalidate a statute.

If a law has been regularly promulgated according to the forms of the constitution, its invalidity will not be examined or passed upon by the judiciary on alleged irregularities or informalities committed by the general assembly in passing it, nor will parol evidence be received to show that the general assembly have not complied with the requirements of the constitution in passing it.

An act of the general assembly will not be declared void because its objects are not set forth in its title, if the title discloses the objects of the act in terms so clear that no one can be misled thereby.

APPEAL from the eighth district court, parish of Orleans.

Joseph P. Hornor, for plaintiffs and appellees.

George L. Bright, for defendant and appellant.

The Louisiana State Lottery Co. v. Richoux.

TALIAFERRO, J. This is an action brought by the plaintiffs against the defendant Richoux and several other parties, to restrain them by injunction from vending lottery tickets of the Havana and other lotteries, in violation of the exclusive right claimed by the plaintiffs to establish lotteries and to sell lottery tickets in this State. A rule *nisi* was granted by the judge *a quo*, which was afterward made peremptory. From this judgment McCarthy, one of the defendants, alone has appealed.

Various grounds are set up in defense; two of them, however, seem to be chiefly relied upon. To these we will direct our attention. They are:

First. That in the passage by the legislature of the bill which plaintiffs found their exclusive privilege upon, as the law securing their alleged right, the requirements of article 42 of the State constitution were not complied with, and the act of the legislature purporting to confer the privilege is therefore null and void.

Second. That the title of the act does not, as required by article 114 of the constitution, express the objects of the law intended to be enacted.

Article 42 of the State constitution provides that "no bill shall have the force of a law until on three several days it be read in each house of the general assembly, and free discussion allowed thereon, unless four-fifths of the house where the bill is pending may deem it expedient to dispense with the rule."

When a legislative act is duly promulgated according to the constitution and laws under which it is passed, we find no authority in the judiciary department to look behind it and determine its validity or invalidity from the proceedings of the general assembly in adopting it. Such a course, it would seem, is not sustainable on the theory of the independent and separate action of the three branches of the State government. When a legislative act is attacked on the ground that it contains provisions that are unconstitutional, the question of its validity is properly within the scope of judicial action. The courts have power, when a constitutional question is raised, to examine whether the thing ordered, permitted or forbidden to be done, may have effect under the sanction of the constitution. The question should be, is the law itself constitutional as to its provisions and what it declares, and not whether it is constitutional as to the manner of its enactment or the proceedings by which it was enacted?

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Courts will presume that the constitutional rules laid down for the passage of laws have been complied with by the law maker, and when duly promulgated will accept them without inquiry as to the observance or non-observance of the required rules and forms in the preparation and passage of bills. The opposite doctrine, we apprehend, would lead to a very confused and perplexing state of affairs in the administration of laws. If courts can examine the regularity of the proceeding had in the passage of bills, what is to prohibit them from determining whether any other constitutional provision, merely ancillary to the exercise by the general assembly of the appropriate function of law-making, has been properly exercised? Conflicting views on this question have been taken by the courts of several of the States of the Union, and we do not regard it as definitely settled by their decisions.

The title of the act incorporating the Louisiana Lottery Company reads thus: "An act to increase the revenues of the State, and to authorize the incorporation and establishment of the Louisiana State Lottery Company, and to repeal certain acts now in force." This title, it is contended, does not fulfill the requirements of article 114 of the constitution, which declares that "every law shall express its object or objects in its title." The interpretation which seems to be given to the title in question is, that the act purports simply to *authorize* the incorporation and establishment of a State lottery company; whereas by the act itself the lottery company is established, a fact which the reader of the title is not apprised of. This interpretation then assumes that, as indicated by the title, the object of the legislature was to authorize itself to incorporate and establish the lottery company — a thing absurd upon its face. How a person could be misled by the title into the supposition that the act does not incorporate and establish a lottery company, we do not easily perceive. True, a more distinct definition of the objects of the act might have been given, but that fact is of no importance if its objects are by the title made sufficiently apparent. Legislators are not always philologists, and their terms and expressions are not to be disregarded if, as it not unfrequently happens, they are not so clearly definite and distinct as they might be made. We think the title fulfills the conditions of article 114 of the constitution.

It is for the reasons stated, ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

SMIG, administrator, appellant, v. ACORD's EXECUTOR.

(21 Gratt, 365.)

Statute of limitations — admission of administrator.

Where one of two joint administrators has an account against his intestate which was barred by the statute of limitations before the death of the intestate, the bar will not be removed, and the debt revived by the statement or admission of his co-administrator that the account is correct.

BILL in equity. The opinion sufficiently states the case.

Michie & Michie and *Young*, for appellant.

Baldwin and *Fultz*, for appellee.

ANDERSON, J. The only question raised upon the record, in the argument of this cause, is with regard to the credit of \$409, allowed Acord, the appellant's intestate, in the settlement of his administration account, with the estate of John Falls, deceased.

John Falls, the intestate, died in September, 1825. Letters of administration on his estate were granted to his widow and Acord jointly. In 1832 Acord made a settlement of his administration accounts, with commissioners of the county court, appointed for the

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purpose, on his motion. In said settlement Acord was allowed to retain, out of the assets which came to his hands, his account of \$409, against the intestate, for money loaned, dated August 26, 1819. There was no bond or note, or other evidence of the debt, except the statement or admission of the administratrix (proved by one of the commissioners), that it was correct. It thus appears that right of action accrued upon this account more than five years before the death of the intestate, and, consequently, that it was barred by the statute of limitations. The whole case is therefore narrowed down to the single inquiry, where one of two joint administrators has an account against his intestate, which was barred by the statute of limitations before the death of the intestate, can the bar be removed and the debt revived by the statement or admission of his co-administrator, that the account is correct?

It has been a question whether the bar could be removed and the debt revived by the promise of a sole administrator, to pay an account against the intestate which was barred by the statute of limitations in his life-time. We are of opinion that it could not. By the revised Code of 1819, volume 1, page 492, section 16, it is made the duty of the court, in a suit against a personal representative, "for the recovery of a debt upon an open account," "to cause to be expunged from such account every item thereof which shall appear to have been due five years before the death of the" decedent. Mr. Robinson, in his new work on Practice, says: "To allow items due five years before a decedent's death to become a charge upon his estate because of an acknowledgment or provision made by his personal representative, would not have been very consistent with the legislative intent manifested" in this act. 1 Rob. Prac. (new) 577. In *Tunstall et al. v. Pollard's adm'r*, 11 Leigh. 1, 38, Judge TUCKER says: "I incline to think an executor is always bound to make this defense; that is, the statute of limitations, unless it be waived by those who are interested." And he cites with approbation *McCulloch v. Davis*, 22 Eng. C. L. 385, in which BAILEY, J., says: "Executors have no right to waive any legal defense to such an action. And if they did, and were to pay a debt against the recovery of which there was any legal bar they would lay themselves liable over to those who were interested in the testator's property." Also it was held in *Rogers v. Rogers*, 3 Wend. 503, that an executor cannot be allowed in his accounts a charge for retaining a debt barred by the statute of limitations. In Delaware it is considered, that if a debt was not

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barred at the decedent's death, his administrator may, by his promise or acknowledgment, keep it alive and free from the operation of the act. 1 Rob. Prac. (new) 575, citing *Parkins' adm'r v. Bennington*, 1 Harr. 209. The supreme court of Connecticut has decided that an acknowledgment by a personal representative that a stale demand is due shall not be allowed to defeat the operation of the statute; he whose duty it is to settle the estate according to law shall not subject it to debts by his declarations or admissions. *Peck v. Botsford*, 7 Conn. 172. While there is some diversity of opinion on this subject in some of the States, it is believed that no case can be found in Virginia where a different doctrine has been held. In the case referred to, *supra*, TUCKER, J., in whose opinion Judges CABELL and BROOKE concurred, was evidently inclined to sanction the doctrine as held in *Rogers v. Rogers*, and as expounded by Justice BAILEY in *McCulloch v. Davis*.

But *Bishop v. Harrison's adm'r*, 2 Leigh, 532, decided by this court, is relied upon by the appellee's counsel as an authority to the contrary. We do not think it is. The opinions of the judges were evidently given in reference to a case where the debt had not been barred in the life-time of the testator, and the promise by the executor was not relied on to remove an existing bar, but to exempt the case from the statute of limitations. This clearly appears from the language of Judge CARR, in his opinion, delivered in the case. "Here (he says) was a debt claimed of the testator; to whom was the creditor to look? To the representative. He applies to the executor while the debt is yet untouched by the statute of limitations, and tells him here is a debt due me by your testator, and here is the proof of it. It is a debt due by simple contract, I must sue at once. The executor replies, I see the debt is just, and I tell you before this witness, I will pay it; therefore, you need not bring suit." It is evident that all the judges in this case were speaking with reference to a promise of the executor to pay a debt which had not been already barred — a debt which had been "*untouched by the statute of limitations*;" and Judge CARR seems to rely upon that, as a warrant to the executor for his promise to pay the debt. It seems to me, therefore, that as the law then stood, as well as now, a debt against the decedent barred by the statute of limitations in his life-time could not be revived and made a charge upon the estate by the promise of the executor or administrator to pay it. And, consequently, if it was a debt due to the personal representative, in his

own right, he could not retain it out of the assets, and charge the estate with it.

But in this case there is no promise of the administratrix to pay. It is only an admission, by one of a joint administration, that the account was correct. And where there is a joint administration, if the admission of one could bind the estate, which is, to say the least, problematical (*Tullock v. Dunn*, Ry. & Mood. 416; 21 Eng. C. L. 478; *Scholey v. Walton, etc.*, 12 M. & W. 509, cited 1 Rob. Pr. [new] 573), it seems to be well settled, that the acknowledgment by a personal representative, that the claim is just, does not imply a promise to pay, as it would, if the acknowledgment had been made by the decedent himself; and, therefore, does not create a charge against the estate. ABBOTT, C. J., in *Tullock v. Dunn, supra*; *Thompson v. Peter*, 12 Wheat. 565; *Oakes v. Mitchell*, 15 Me. 360; *Bunhur v. Athedyn*, 35 id. 364; cited 1 Rob. Pr. (new) 575; *Head's ex'rs v. Manners' adm'rs*, 5 J. J. Marsh. 255. We are of opinion, therefore, that the decree of the circuit court is erroneous in overruling the exception to this item in the account of the commissioner, designated as report No. 2, and in allowing the same as a debt against the estate of John Falls, deceased. But as the report of commissioner No. 3, filed the day of June, 1855, ascertains what is the true state of account, omitting this item as a debit against the estate, we are of opinion that the circuit court erred in adopting the report No. 2, of Commissioner Hendren, and in not adopting report No. 3 of said commissioner. The court is of opinion, therefore, that the decree of the circuit court, so far as it is in conflict with this opinion, should be reversed, with costs to the appellants, and in all other respects should be affirmed.

Decree accordingly.

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MOSES, plaintiff in error, v. TRICE.

(21 Gratt. 556.)

Promissory note—lost note—payment—effect of renewal.

An action at law will not lie on a lost negotiable promissory note.

Defendant proposed to pay his note to plaintiff, but at plaintiff's request the note was renewed, upon the understanding that it should be deposited in bank for collection. Subsequently defendant deposited in his own name the amount of the note in the bank, which was burned, with the contents, before the note had matured or been deposited. *Held*, that defendant was liable for the amount of the note.

A promissory note given for a debt does not operate as an extinguishment or payment of the debt, unless it be so accepted by the creditor, and a note in renewal is but a continuation of the debt, and if it is not paid at maturity, the creditor may sue upon it, or upon the original cause of action.

ACTION by Trice against Moses, as maker, and Davis, as indorser, of a lost negotiable note for \$21,000. It appeared that in the latter part of 1863, or early in 1864, Trice lent Moses about \$25,000 of Confederate currency, who executed therefor his negotiable note, with Davis as indorser, payable in ninety days. This note was renewed from time to time, and at one time \$4,000 of the principal was paid. One of the renewed notes fell due on the 4th of January, 1865, and at that time Moses offered to pay the amount of it; but, at the request of Trice, another renewal note was given, payable at ninety days at the Bank of Virginia, with the understanding that it should be deposited in the bank for collection. Subsequently Moses deposited, in his own name, at the bank, money equal or exceeding the amount of the note, but the bank was burned before the note came due, and before it had been deposited for collection. Payment having been refused, the note was put in the hands of a notary, from whom it was stolen. The rulings, charges, and refusals to charge, are sufficiently set out in the opinion. Verdict and judgment for plaintiff. Defendant appealed.

Keily, for appellant.

Lyons, for appellee.
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STAPLES, J. This case presents the question, whether an action at law can be maintained upon a lost negotiable note transferable by delivery. No decision can be found in the Virginia Reports involving this precise point. In England the doctrine is firmly established, that such an action cannot be maintained; and the sole remedy of the owner is in a court of chancery, which can adjust the equities of the parties, and require suitable indemnity as a condition of relief. *Hansard v. Robinson*, 7 Barn. & Cress. 90; *Ramuz v. Crowe*, 1 Exch. 166; 18 Eng. Law & Eq. 514. In this country there has been some conflict of opinion on the subject; but the great weight of authority is in harmony with the English doctrine. In some of the States statutory remedies have been provided, by which most of the difficulties standing in the way of actions at law have been removed. In other States having common-law and equitable powers blended in the same courts, it is the constant practice of those courts to assume jurisdiction in this class of cases. Thus, in Massachusetts, it has been decided that the court, holding a just regulating power over the judgment and proceedings before it, has authority to prescribe an equitable security to the maker of a lost note, by a proper and suitable indemnity. *Fales v. Russell*, 16 Pick. 315. And so in Pennsylvania, it is held that the failure to indemnify is not in bar of the action, but is merely a prerequisite to an execution to enforce the judgment, and the right to restrain such execution is an equitable power vested in the courts, to be administered with the machinery of common-law forms.

It is obvious that these principles have no application in those States where the common law and equity tribunals are separate and distinct. In these latter, we find the courts of common law steadily refusing to take jurisdiction of suits upon lost negotiable instruments. 2 Pars. on Bills and Notes, 296-298 and notes; 2 Rob. Prac. (new ed.) 220. The learned counsel for the appellee has cited a number of cases which he supposes to be in conflict with these views. Some of these cases show that when a bank note has been cut in halves, and one-half lost, the holder may recover upon the other half at law. Upon this proposition there is also much conflict of decision. But whatever may be the rule in some of the American courts, in regard to action upon bank notes, the cases of the *Bank of Virginia v. Ward*, 6 Munf. 166; *Farmers' Bank of Virginia v. Reynolds*, 4 Rand. 186, indicate that in this State no such action can be maintained; because the owner can only recover on establish-

ing his title by the judgment of a court of equity, and giving a satisfactory indemnity to secure the bank against future loss from the appearance and setting up the other half of such note.

In *Renner v. Bank of Columbia*, 9 Wheat. 581, the note was lost after suit brought, not by the plaintiff or his agents, but by the officers of the court. The holder had a perfect right of action at law at the time of the institution of his suit; he could not be deprived of that right by an accident in no manner attributable to his negligence, and turned round to another forum for redress. This rule is recognized in other cases; and is not in conflict with the general principle applicable to negotiable instruments. That principle is, that the party to such an instrument, when he is called upon to pay it, has the right to insist it shall be produced and delivered up to him. And this rule is not varied because suit is brought and payment demanded under compulsory process of law. In either case the maker has the right to call for the production of his note.

As the owner, however, in case of loss of the instrument, cannot do this, the courts allow a recovery upon the terms of his giving proper indemnity. A court of common law cannot require such indemnity as a part of its judgment. It can neither impose terms upon the plaintiff as a condition of such judgment, nor prevent the issue of an execution thereon. In *Pierson v. Hutchison*, 2 Camp. 211, Lord ELLENBOROUGH said, whether an indemnity would be sufficient or insufficient, is a question of which a court of law cannot judge. See, also, *Greenway, ex parte*, 6 Ves. 862; *Aranguese v. Scholfield*, 38 Eng. L. & Eq. 424; 1 Story's Eq. Jur., §§ 84, 85. Numerous other authorities might be mentioned to the same effect. They establish that the only remedy in such cases is in a court of equity, where all the circumstances of the loss can be fully investigated, and a suitable and proper indemnity provided.

It is insisted, however, that these principles do not apply in the case of notes lost after maturity. The counsel for the appellee says it is clear that a protested negotiable note has no more negotiability, according to the law merchant, than a bond or other paper originally not negotiable. No authority is cited in support of this proposition. I will not say no cases or dicta can be found to sustain it. It is certainly in conflict with the leading decisions and the opinions of the most accurate writers on commercial law. In Story on Promissory Notes, § 178, it is said "a negotiable note may be trans-

ferred at any time while it remains a good, subsisting, unpaid note, whether before or after it has arrived at maturity; and, in the latter case, even though it be protested for non-payment, and bears upon its face the marks of its dishonor." In *Miller v. Davis*, 14 Gratt. 1, 13, Judge MONCURE, speaking for the court, says, in reference to overdue notes: "It has long been settled that they are negotiable; and it belongs to the legislature to make them assignable only." See, also, *Baxter v. Little*, 6 Metc. 7; 2 Rob. Prac. (new ed.) 253; 2 Parsons on Bills and Notes; Chitty on Bills, 217; Redf. & Big. Leading Cases on Bills of Exchange and Promissory Notes.

It is true that the person taking a dishonored note takes it subject to all the equities attaching to the instrument in the hands of the original parties; and it may be conceded, for the sake of argument, that, when the note has been lost, he holds it subject to all the objections which affected it in the hands of the party who first tortiously transferred the note. But the answer given to this reasoning is, that it is part of the contract of the maker to pay on the presentment of the instrument to him for that purpose, and he has, therefore, a right to its possession as his voucher against a future demand. Besides, the maker may not be able to show the note was lost after maturity; and he is not to be exposed to such risk without indemnity.

In *Hansard v. Robinson*, 7 Barn. & Cress. 90, Lord TENTERDEN said: "If the bill should afterward appear, and a suit be brought against the acceptor, a fact not absolutely improbable in the case of a lost bill, is he to seek for the witnesses to prove the loss, and to prove that the new plaintiff must have obtained it *after it became due*? Has the holder a right, by his own negligence or *misfortune*, to cast this burden upon the acceptor, even as a punishment for not discharging the bill on the day it became due? We think the custom of merchants does not authorize us to say that this is the law." It is impossible to deny the force or soundness of these views. They are fully sustained by the adjudicated cases by the most eminent writers on Commercial Law, and by the opinions of three of the judges of this court; and must be regarded as the established doctrine of this State. *Miller v. Davis*, 14 Gratt. 1; 2 Greenl. Bill of Exchange and Promissory Notes; Story on Promissory Notes, § 450, note 2; Byles on Bills, 300; 2 Parsons on Notes and Bills, 295; Edwards on Bills, 297.

When, however, it appears that the note or bill has been destroyed,

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different principles apply. Whatever diversity of opinion, on this point, may have formerly existed, it is now the established doctrine that the holder, upon showing the destruction of the note after its maturity, may recover thereon in a court of law. In such case no indemnity is necessary, as the maker can, in the nature of things, encounter no risk in paying the note. Leading Cases upon Bills of Exchange and Promissory Notes, 679; 2 Parsons on Bills and Notes, 295; Chitty on Bills, 154. It is true that, when the evidence of the destruction is merely presumptive, the maker is exposed to the danger of the reappearance of the instrument in the hands of a *bona fide* holder. This, however, only manifests the importance of clear and satisfactory proof of the destruction. The degree of evidence necessary to constitute such proof can never be previously defined. It is impracticable, in the nature of things, to lay down any rule on the subject. The only legal test in this, as in other cases, is the sufficiency of the evidence to satisfy a jury beyond reasonable doubt that the note is no longer in existence.

The evidence adduced by the defendant in error, in the court below, established the loss of the note by robbery; but was not of itself sufficient to prove its destruction. It was not offered with that view, nor passed upon by the jury in that connection. The motion to exclude the evidence substantially raised the question of the right to sue at law upon a lost note; and the ruling of the court was in effect an affirmance of the right. The court no more invades the province of the jury by excluding evidence than by pronouncing it insufficient in law. By one course the evidence is thrown out of the case, and by the other it is destroyed; which in effect is the same thing. *Bell v. Crawford*, 8 Gratt. 110, 132. I think, therefore, the court erred in overruling the motion to exclude the evidence set out in the first bill of exceptions. For this error the judgment must be reversed, and the cause remanded for a new trial. On such trial the defendant in error may be prepared to produce the note, or possibly to trace it to the possession of the plaintiff in error; or to show that, at the time of the trial, a recovery thereon would be barred by operation of the statutes of limitation; or he may be able to produce satisfactory evidence of the destruction of the note, or such circumstances as would plainly justify a jury in presuming that fact. Although the evidence set out in the first bill of exceptions only proved the loss of the note by robbery, yet, if hereafter offered in connection with other facts and circumstances tending to prove its destruction,

the court below would be warranted in permitting it to go to the jury for the purpose of creating a presumption that the instrument had been in fact destroyed.

These views render it necessary to consider the remaining grounds of error suggested by the plaintiff in error. One of these is to the refusal of the circuit court to give certain instructions, designated in the record as defendant's instructions Nos. 3, 4 and 5. The proposition involved in the fifth was settled by this court in *Magill v. Manson*, 20 Gratt. 527. Instructions No. 3 and 4 raise the question of the extent of the liability imposed by the negotiable note in controversy. It appears that in the latter part of the year 1863, or early in the year 1864, the plaintiff in error borrowed from the defendant in error about twenty-five thousand dollars, in Confederate treasury notes, and executed therefor his negotiable note with an indorser, payable in ninety days, without interest. This note was renewed from time to time, the plaintiff in error paying the interest in advance upon each renewal; and on one occasion four thousand dollars of the principal. The note in question is one of those, and the last executed upon such renewal.

The first instruction of plaintiff in error asserts the proposition that he was discharged from the debt by his offer to pay the note maturing in January, 1865; his subsequent deposit of the amount due in the bank of Virginia, and its entire loss by the failure of the bank. It may be true that the plaintiff in error offered to make such payment; and that he was induced by the persuasions of the defendant in error to withdraw such offer and to retain the money in his own hands; but these matters constituted neither a payment nor an accord and satisfaction of the debt. Had the plaintiff in error persisted in his tender, and then deposited the notes in bank to the credit of the defendant in error, there might be some plausibility in his pretensions. But so far from insisting on the tender, he waived it and permitted himself to be persuaded to retain the money, and executed a new note for the debt. His subsequent deposit of his funds in bank in his own name, and their ultimate loss, cannot affect the obligation of his contract. The court was, therefore, not in error in refusing this instruction.

The question intended to be raised by the other instructions relates to the time of applying the scale of depreciation; the plaintiff in error insisting that January, 1865, the date of the last note, should be adopted. As the note matured after the close of the war, the rule

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in *Dearing's Adm'x v. Rucker*, 20 Gratt. 426, cannot apply. What rule should be adopted in such case has never been settled, nor is it necessary to consider that question now. As before stated, the original loan was made in 1863 or 1864, a note given for its repayment, which was renewed from time to time. The last note being dishonored, there is nothing to prevent a resort to the original consideration. Upon familiar principles, if a note is taken as a conditional payment, or in renewal, and is not duly paid or discharged, the original debt revives; and this principle applies to every renewal, which is but a continuation of the same debt. Nor is it material whether the note or bill be given for a precedent or cotemporary debt; in neither instance will it operate as an extinguishment or payment, unless it be so accepted by the creditor. If not paid at maturity the creditor may sue upon it, or upon the original cause of action. And if, between the time of drawing the bill or making the note, the currency is depreciated in which it is to be paid, it should be discharged according to the value at the time when the note or bill was executed. Story on Bills of Ex., § 418; Byles on Bills, 284; 2 Para. on Bills and Notes, 156; 5 Rob. Prac. 845; *Farmers' Bank v. Mutual Assurance Society*, 4 Leigh, 69; *Parker v. Cousins*, 2 Gratt. 372. In this case the defendant in error might have sued for the original debt, or he might have inserted in his declaration a count for the recovery of the amount loaned. His failure to do so does not preclude the jury from applying the scale at the date of the loan, if it seemed to them right and proper under all the circumstances. If, however, any error was committed in respect of this matter, the plaintiff in error has no cause of complaint, as the court, on his motion, instructed the jury it was their province to fix the period for applying the scale. The court, however, further instructed the jury that the plaintiff was entitled to their verdict for the value of the Confederate notes at the date of the original transaction. Under the act of 1866-'67, it is the province of the jury to fix the period at which the scale of depreciation shall be applied. In the exercise of this discretion they cannot be controlled by the court, unless, indeed, the contract of the parties, or some fixed rule of law, prescribes the measure of recovery. The court was, therefore, in error in giving this instruction; nor was the error corrected by the subsequent instruction given at the instance of the defendant, that it belonged to the jury to fix the period for applying the scale of depreciation.

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For these errors the judgment must be reversed, and the cause remanded for further proceedings, in accordance with the principles herein announced.

Judgment reversed.

WALKER, plaintiff in error, v. HERRING.

(21 Gratt. 673.)

Statute of frauds—agreement to purchase property at auction. Auctioneer.

An agreement was entered into between W. and H. to purchase property jointly at auction. In pursuance thereof, W. bid off the property, and in the auctioneer's memorandum the name of W. was written as purchaser. On the following day a partner of W. added the name of H. as purchaser in the memorandum, without the direction of H., who refused to fulfill his part of the agreement. A loss having occurred by a resale, in an action by W. against H., to recover his share of the loss, *held*, that the agreement was within the statute of frauds; that the memorandum did not take it out of the statute, and that H. was not liable.

The agency which an auctioneer assumes for a purchaser commences with the bidding and terminates at the close of the sale, and unless the name of a purchaser is entered in the sale books at the time of the sale, the purchaser is not bound.

ACTION by Isaac N. Walker against George J. Herring. The opinion states the case. Judgment below was in favor of defendant. Plaintiff appealed.

A. A. Smith, for appellant.

Steger & Sands, for appellee.

STAPLES, J. This is a writ of error to a judgment of the district court at Williamsburg, affirming a judgment of the circuit court of the city of Richmond. The action was instituted to recover one-half the amount paid by the plaintiff in error, who was plaintiff in the court below, for the loss and expense arising from a resale of a house and lot in the city of Richmond. The plaintiff alleges an agreement between himself and the defendant, by which they were

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to become the joint and equal purchasers of this property; that, in execution of this agreement, he bid for and became the purchaser, and fully complied with all the terms and conditions of sale, so far as was incumbent upon him; but that the defendant refused to perform his part of the contract, in consequence of which it became necessary to resell the house and lot; that the loss and expense attending this resale amounted to a considerable sum, which the plaintiff had paid to the owners of the property; and for one moiety of which defendant was responsible to him.

That the contract as stated is within the statute of frauds and perjuries is well settled, upon the authority of numerous cases. The decision of this court in *Henderson v. Hudson*, 1 Munf. 510, is directly in point. In that case Chancellor WYTHE decided that the statute applied to contracts, and actions upon them, between the buyers and sellers of land; and not to a contract between the purchaser and a third person, that such person shall be admitted as a partner in the purchase. This court, however, reversed the decision. Judge FLEMING, with whom the other judges concurred, said that although the contract was not between the buyer and seller, yet it was within the mischief intended to be guarded against by the statute, which being a remedial one, and intended to prevent a growing evil, ought to be liberally construed. The cases of *Cooke v. Toombs*, 2 Ans. 429; *Henley v. Brown*, 1 Stew. (Ala.) 144; *Parker's Heirs v. Bodley*, 4 Bibb. 102, affirm the same doctrines. It is true that in *Henderson v. Hudson* the application was for a conveyance of land by a person claiming to be a purchaser, but it is clear that the same principles apply whether the vendor or vendee be the party complaining; whether the proceeding be by bill in equity or by action at law upon the contract.

The next and only question to be considered is, whether the alleged contract is evidenced by a writing sufficient to take the case out of the operation of the statute of frauds and perjuries. It is now well established that, in sales of real estate, at public auction, the auctioneer conducting the sale is to be regarded as the agent of both vendor and purchaser; and a memorandum of the terms and conditions of sale signed by him is a sufficient writing within the statute. Does this case come within the operation of this principle? It appears that, at the time of the sale, or immediately thereafter, a memorandum was made by Messrs. Goddin & Apperson, the auctioneers, in which Isaac W. Walker, the plaintiff, is stated to be the

purchaser. Subsequently, the terms were written out upon the sales-books of said auctioneers, and the name of the plaintiff again recorded as the purchaser. The day after the sale the name of the defendant was added to the statement on the sales-book, in pencil, as a purchaser also. This addition, however, was not made by the auctioneers, but by a member of the firm who was not present at the sale, and who had no information of its terms or the purchaser, except what was derived from others. It does not appear at whose instance he made the addition; certainly not that of the defendant himself, as it is in proof that the person making the entry never had any conversation with the defendant on the subject of the sale. It will thus be perceived that the memorandum, so far as it affects the defendant, was not made contemporaneously with the sale, nor was it made by the persons conducting it; but by one who was absent when it took place, and who was in no manner authorized by the defendant to attach his signature to any writing or contract whatsoever.

There is no express decision upon the point by a Virginia court; but, in a careful examination of authorities elsewhere, I have found no case which holds that a memorandum drawn up and signed by the auctioneer, long after the sale is completed and ended, is to be regarded as a writing within the meaning of the statute of frauds and perjuries so as to bind a purchaser at such sale. With regard to the seller, the rule may be different. The auctioneer is his agent selected and remunerated by him, acting in his interests, and in a measure subservient to his wishes. The agency may be justly regarded as continuing until the close of the whole transaction. The purchaser, on the other hand, has nothing to do with the selection or the employment of the auctioneer. The agency created by him commences with the bidding, and terminates when the sale is concluded.

In *McComb v. Wright*, 4 Johns. Ch. 659, Chancellor KENT uses the following language: "It appears now to be settled by the English authorities that the auctioneer is a competent agent to sign for the purchaser, whether a sale of lands or goods at auction, and the insertion of his name as the highest bidder in the memorandum by the auctioneer, immediately on receiving his bid and striking down the hammer, is a signing within the statute as to the purchaser." In support of this position, he cites many cases, English and American, and in all of them the immediate signing of the memoran-

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dum of the terms, and of the name of the purchaser, is prominently mentioned as one of the material elements of a valid contract.

In *Smith v. Arnold*, 5 Mason's C. C. 414, Mr. Justice STORY says: "The memorandum of the auctioneer to bind the purchaser must be contemporaneous with the sale."

In *Gill v. Bicknell*, 2 Cush. 355, Judge SHAW says: "The name of the bidder must be entered by the auctioneer, or by his clerk under his direction, *on the spot*."

In the case of *Horton v. McCarty*, 53 Me. 394, KENT, J., says: "The law, in allowing the auctioneer to act in the nearly unprecedented relation of agent for both parties, imposes a qualification not applied to the usual cases of agency, and requires that the single act for which, almost from necessity, he is authorized to perform for the buyer shall be done at the time of sale, and before the termination of the proceedings."

The case of *Mews v. Carr*, 1 Hurlst. & Norm., 1 Exch. 484, presents a very striking illustration of this rule. There the plaintiff put up for sale, by public auction, a quantity of lumber, several bills of which remained unsold. A few days afterward the defendant called on the auctioneer, and selected from the catalogue two of the unsold lots, which he agreed to purchase, and thereupon the auctioneer, in the presence of the defendant, wrote his name on the lists opposite the lots so purchased. POLLOCK, C. B., said: "No doubt an auctioneer at the sale is agent for both seller and buyer, so as to bind them by his signature; but the moment the sale is over the same principle does not apply, and the auctioneer is no longer the agent of both parties, but of the seller only." *Buckmaster v. Harrop*, 13 Ves. 456; *Entz v. Mills & Beach*, 1 McMul. 454, are to the same effect.

Tested by these principles, it is manifest that the contract here cannot be enforced. It does not appear that the auctioneers were ever informed at the time of the sale, or during the day, that the defendant was a bidder, or in any manner interested in the purchase. The entry of the defendant's name was made by a member of the firm, who was not present at the sale, and who was neither expressly nor impliedly authorized by defendant to act as his agent, or bind him in any manner whatever.

The principle of all the cases is, that the auctioneer at the sale is the agent; that the purchaser, by the act of bidding, calls on him or his clerk to put down his name as the purchaser. The entry, being

made in his presence, is presumed to be made with his sanction, and to indicate his approval of the terms thus written down. In such case there is but little danger of mistake or fraud. But if a third person, not present, or even the auctioneers, may afterward add the name of another purchaser, they may strike out the name already inserted, and substitute that of a new and different purchaser. They may defeat rights already vested. They may impose liabilities never contracted. The party to be charged may thus be held liable by a writing he never saw, signed by an agent of whom he never heard. For, as the memorandum in these cases is the only evidence of the contract, no parol testimony can be received to show that the terms had not been truly and correctly stated. The rule applicable to auctioneers' sales was not established without strong opposition from able jurists. Every principle of justice and sound policy requires that the limitation thrown around them should be rigidly adhered to by the courts.

There are other questions presented by the record, but it is unnecessary to notice them. For the reasons stated, I am of opinion the judgment of the district court should be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
OREGON.

WEISE, appellant, v. SMITH.

(8 Or. 445.)

Riparian rights — navigation of streams.

A stream capable of being commonly and generally useful for floating boats, rafts or logs for any useful purpose is subject to the public use as a passage way.

Defendant, in using a stream for floating logs, attached a boom to plaintiff's land. In an action for damages, the judge instructed the jury that, if the stream was adapted to floating logs, and a boom was necessary for that purpose, the plaintiff's right was subrogated to a reasonable use by the public. *Held* correct.

ACTION by Peter A. Weise, the owner of land situated on the Tualatin river, against Samuel Smith, for damages arising to plaintiff in consequence of defendant keeping a boom in said river attached to plaintiff's land. Defendant was engaged in floating logs down the river from points above plaintiff's land to the saw-mills below. The remaining facts appear in the opinion. At the trial evidence was admitted, under plaintiff's objection, to show that plaintiff had previously permitted booms to be placed and used in the same manner without dissent. The judge instructed the jury that, if the Tualatin was adapted to floating logs, and a boom was necessary for that purpose, the plaintiff's right was subrogated to a

reasonable use by the public, and that they were to determine whether the boom was extended an unreasonable time.

Judgment for defendant. Plaintiff appealed.

Wail & Kelly, for appellant.

Johnson & McCown, for respondent.

UPTON, J. It is conceded in the argument, that, to some extent, or for some purposes, the Tualatin river is a navigable stream from its mouth to many miles above the place in question. At the point of the alleged trespass, or a short distance above it, the river is not navigable for boats, but for the whole distance the stream is available as a means of conveyance for saw-logs. One of the circumstances set up by the plaintiff, as a basis for additional damages, is that immediately at the place where the boom was stretched, the plaintiff had occasion to navigate the river with his skiff; and that, by the alleged wrongful acts of the defendant, that navigation was interrupted. The chief inquiry and point in issue touches the relation and liabilities existing between riparian proprietors and persons using the stream, for purposes connected with navigation. It is necessary to consider how far the principles and rules that have been applied to affairs pertaining to the navigation of tide waters and large streams, capable of floating ships of commerce, are to be applied to streams like the one under consideration. While it is conceded by the appellant that the Tualatin river is to a certain extent navigable, it is claimed that it is "a fresh water stream above the ebb and flow of the tide," and hence the rules applicable to arms of the sea and great rivers, where the tide ebbs and flows, are not applicable here.

It may be considered the settled law of the United States, that so much of the doctrine of the common law of England, as made the ebb and flow of the tide a test of navigability, is not now applicable in the United States. On the contrary, the maxim of Lord MANSFIELD, "out of the fact arises the right," is applied by the courts of this country. *Morgan v. King*, 35 N. Y. 454; *Jones v. Pettibone*, 2 Wis. 308.

It is held more rational to determine the question of navigability or unnavigability of a stream, from the fact of navigation or other wise, than from a circumstance which may or may not be conclusive

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evidence of its navigability. *People v. Canal Appraisers*, 33 N. Y. 472.

The case just cited is a very full and thorough exposition of the test of navigability, and it is more than inferable, from the reasoning in that case, and in the numerous American cases there cited, that if a stream is in fact capable, in its natural condition, of being profitably used for any kind of navigation, its use is to that extent subjected to the general rules of law relating to navigation, applicable to the circumstances of the case. The large amount of lumber business done in the State of Maine has undoubtedly led the courts of that State to give great consideration to the particular subject involved in this case, and they hold to the same rules on the subject of the use of small streams that are announced in the case last cited. A stream which, in its natural condition, is capable of being commonly and generally useful for floating boats, rafts or logs, for any useful purpose of agriculture or trade, though it be private property, and not strictly navigable, is subject to the public use as a passageway. *Brown v. Chadbourne*, 31 Me. 9; 42 id. 558.

"Though the adaptation of the stream to such use may not be continuous at all seasons, and in all its conditions, yet the public right attaches and may be exercised whenever opportunities occur." Id. "When a stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs, the public easement exists, notwithstanding it may be necessary for persons floating logs to use its banks." Id. "The Penobscot river, above the tide, is not a navigable stream, technically speaking, although a highway, floatable for boats, rafts or logs, and as such subject to the public use." *Veazie v. Dwinell*, 50 Me. 479.

"No person has the right to permanently obstruct the channel of such stream by a boom across it, though he may do so temporarily, if necessary for the useful navigation of the stream." *Davis v. Winslow*, 51 Me. 264.

The court in this case remarks: "What is reasonable use, or due use, depends in every case on the subject-matter to which the case is to be applied, and the circumstances attending the subject-matter at the time." Every person has an undoubted right to use a public highway, whether upon land or water, for all legitimate purposes of trade and transportation, and if in doing so, while in the exercise of ordinary care, he necessarily and unavoidably impede or obstruct another temporarily, he does not thereby become a wrong-doer; his

acts are not illegal, and he creates no nuisance for which an action can be maintained. If we concede the correctness of the reasoning in the above cases, it follows that upon "a stream capable of being commonly and generally useful for floating boats, rafts or logs, for any useful purpose," and consequently "subject to the public use as a passage-way," the persons lawfully using it can invoke in their favor all general rules of navigation that are in the nature of things applicable to the particular circumstances and kind of navigation. How far, then, may one who has an undoubted right to navigate the stream, meddle with or touch upon the bank of the stream, which is private property? Whatever he has is founded upon necessity. If he has a right to meddle with the bank, it is only an incidental one. Although the riparian owner has an absolute right to enjoy his land, in all proper ways, the adverse party has an absolute right, as one of the public, to navigate the stream. Neither one can justly deprive the other of his rights. If the riparian proprietor could deny the navigator the right to come to land, in a case where the business of navigating could not be performed without the privilege of landing, he could deny all use of the stream. He would thus overturn all that was contended for and adjudged in the cases above cited. While it is beyond question that the riparian owner is entitled to be protected from any unnecessary intrusion on his premises, it is equally certain that he cannot, solely for the maintenance of an abstract right, or an exclusive possession, deny to the public the right of navigation. He takes his title subject to this right vested in the public.

If there had been no necessity for fastening the boom to the plaintiff's land, the act of fastening it would have been a trespass, for which the plaintiff ought to recover nominal damages, at least; but if the act was necessary, in order to enable the plaintiff to exercise a right of navigation, no cause of action would lie for a bare intrusion which worked no appreciable damages. Whether the necessity existed was a question for the jury.

It was said in argument "the respondent claims the right to obstruct the river as a public right." I think this was stating the respondent's claim too strongly; he claimed the right to attach his boom as a public right, and as necessary in order to use the stream, and it is true that the boom, if kept attached too long, became an obstruction, but he sought to excuse his act of leaving the boom attached a considerable time, upon the plea that an unexpected rise

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of water rendered it impossible to detach it sooner. If he had a right to extend the boom to catch the logs, he, of course, had a right to keep it extended a reasonable time for that purpose. The question, what was a reasonable time for the removal of the boom, was a question of fact, and was properly left to the jury. The record does not disclose that the plaintiff was injured, or that admitting proof that the plaintiff had permitted booms to be placed on his land on previous occasions the court erred in that particular; for aught that appears by the record it may have been properly offered in mitigation of damages.

Judgment should be affirmed.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

THE CINCINNATI MUTUAL HEALTH ASSURANCE Co., appellant, v.
ROSENTHAL.

(55 ILL. 55.)

Foreign insurance company—power of State to regulate—validity of contracts of.

A foreign insurance company cannot, without first complying with the laws of Illinois enacted for their regulation, make contracts which it may enforce; and where the company fails to file the statement of its condition and the consent of the auditor to transact business within the State, as required by law, the company cannot recover on a note given in such State, for stock and premiums, notwithstanding the law imposes a penalty for doing business in such State in violation of its provisions.

ACTION of assumpsit, brought by appellants, in the recorder's court of Chicago, against appellee, to recover the unpaid balance of a note. The note was given to appellants for stock in the company and for premium, subject to the call of the directors of the company. The general issue was filed, also a special plea. The latter plea, in substance, averred that appellants were an assurance company, created under the laws of the State of Ohio, and not under or by the laws of this State, for the purpose of insuring the health of persons against personal injury or disability; that, at the time the note was given, appellants were an insurance company, under the laws of

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Ohio, and had come into this State to transact business as such; that in consideration appellee would pay to appellants \$150 cash, and would execute to the company a note for \$350, due on demand, to be paid subject to the call of the directors of the company, did unlawfully enter into a contract to insure the health of appellee, for the period of five years, in the sum of \$25 for each week he might be prostrated by disease during the next five years, whether from disease or by accident, which should prevent him from prosecuting any kind of business, and the company then issued a policy on these terms to appellee. Appellants also agreed to issue to appellee a certificate of stock of its guaranteed capital in the company, to the amount of \$500, which was issued and delivered, and was by him accepted, when he paid the money and gave the note sued upon in this case.

It was further averred that, at the time this agreement and transaction were consummated, appellants were a corporation created by the laws of the State of Ohio, and had not, at any time previous thereto, furnished the auditor of this State with the statement of the condition and affairs of the company, under the oath of the president or secretary of the company, showing the facts required by the laws of this State, nor had the auditor issued to the company, or any agent, any authority to transact business in this State, which, it is averred, rendered the note sued upon void and of no binding effect. To this plea, appellants filed a demurrer, which was overruled by the court, and judgment was rendered on the demurrer in favor of appellee, to reverse which the record is brought to this court by appeal, and appellants assign the overruling of the demurrer as error.

Moore & Caulfield, for appellants.

Rosenthal & Pence, for appellee.

WALKER, J. (after stating facts). This record presents the question, whether foreign insurance companies can, without first complying with the laws of our State, enacted for their regulation, make contracts which they may enforce. The general assembly on the 14th of February, 1855 (*Scates' Comp.*, § 1, p. 596), enacted, that it should not be lawful for any agent or agents of any insurance company incorporated by any other State than this, to directly or

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indirectly, take risks, or do or transact any business of insurance in this State, without first procuring a certificate of authority from the auditor of State. And before obtaining such certificate, such agent is required to furnish the auditor with a statement, under oath, of the president or the secretary of the company, which shall show — First, the name and locality of the company; second, the amount of its capital stock; third, the amount paid up; fourth, the assets of the company, and of what they consist; fifth, the amount of liabilities, etc.; sixth, losses adjusted, due, etc., which is required to be filed with the auditor, together with a written instrument, under the seal of the company, signed by the president and secretary, authorizing such agent to acknowledge service of process on behalf of the company, and consenting that service of process upon him shall be held valid, and waiving all error by reason of such service. The act then requires that the company shall possess a capital of at least \$100,000 of actual capital invested in stocks at par, or upward, or in bonds or mortgages of real estate worth double the amount for which it is mortgaged, as a condition to their doing business in this State.

Now, the demurrer admits that none of these requirements had been observed by appellants. The act, it is seen, in express language, prohibits such companies from effecting insurance or transacting business in this State until they have filed the statement and consent required. Corporations created in another State are not citizens of such State within the meaning of the federal constitution. This question is settled by the case of *Ducat v. City of Chicago*, 48 Ill. 173, and the case of *Paul v. The State of Virginia*, 8 Wall. 168, subsequently decided by the supreme court of the United States. We regard this question as settled, and shall, therefore, omit any discussion of that point. In those cases, it was held, that the various State legislatures have the power to impose conditions upon which insurance, or other corporations chartered beyond the State, may do business within its territory; that the right of protecting their citizens from fraud and imposition of insolvent or spurious corporations of this character, created by other States, was clearly within the scope of legislative power possessed by the various States of the Union. And in this view of the case, it cannot matter that the charter of this Ohio company declared that it might do business in other States. If such a provision was inserted, it could only operate as an authority to the company to do so on such terms

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as other States might prescribe. That State does not, nor can it, have any power to enact laws regulating the actions of persons, the title to property, or the effect of contracts, in this or any other State. The boundary of that State is the limit of its legislative power. If such a provision is contained in the charter of appellants, it was not enacted to become the law of other States, but simply, as we have said, to license the company to transact business beyond the limits of their State, with the consent of the foreign jurisdiction in which they proposed to act. This company, then, were bound to conform to the law to which we have referred, before they were authorized to effect insurance or make contracts in this State.

From this enactment, it is manifest that our general assembly adopted these provisions as a matter of general policy, intended and well calculated to protect the people of the State from loss by foreign insurance companies, who are insolvent or worthless, by requiring all foreign companies, before they could transact business in this State, to make an exhibit of their condition, and file it with the auditor of public accounts, by which our citizens could know whether such a company was responsible before entering into contracts of insurance with them. That such provisions were demanded, is no doubt true, and that they are highly remedial, we do not doubt. The note was made and delivered, and the policy given and the contract consummated in this State, in defiance of a law which is so plain in terms, that it can bear no construction, and which no one can misunderstand, declaring all such contracts unlawful. It says, it shall not be lawful for any such agent, directly or indirectly, to take risks, or transact any business of insurance in this State, until they comply with the terms prescribed in the act. To permit the company, when they admit that they have disregarded all of these requirements, to recover, would be for the courts to disregard the clearly expressed will of the general assembly, and to say what it has said shall be unlawful, is and shall be lawful and binding. To enforce the payment of this note would be virtually to repeal a plain enactment of the legislature.

When the legislature prohibits an act, or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give the person, or

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corporation, or individual, the same rights in enforcing prohibited contracts, as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so, places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void as to appellee, we entertain no doubt. See *Munsell v. Temple*, 3 Gilm. 93. That courts may have held, that when a statute has prohibited the doing of an act, and imposed a penalty, simply, the act was not void, may be true, but we doubt the correctness of such a construction.

That the legislature imposed, by a subsequent section of the act, a penalty for the violation of the provisions of the law, does not, in the remotest degree, legalize or give validity to the note. It but shows that the general assembly intended to adopt such measures as should compel the observance of the law. Had no penalty been provided, no one would have, for a moment, hesitated to say, that the note was, under this law, utterly void; and, if so, why should we hold that the imposition of the penalty alters or changes, in the slightest degree, the previously declared will, that the act should be unlawful. In the case of *Bensley v. Bignold*, 5 Barn. & Ald. 335, where a printer had brought an action to recover for the price of paper furnished, and printing a pamphlet entitled: "An Elucidation of the System of Fire and Life Insurance," it was held, that a recovery could not be had, because the name of the printer, the place of his abode, and the place where printed, were omitted from the front page of the pamphlet, contrary to an act of parliament, which prescribed a penalty of £20 for such omission.

In the case of *Law v. Hodgson*, 2 Camp. 147, it was held, that a person selling bricks under the statutable size, who thereby forfeited a penalty of twenty shillings, could not recover for them. This case is also reported in 11 East, 300. In the case of *Langton v. Hughes*, 2 Maule & Selw. 593, it was held, that a druggist who sold drugs to a brewer, knowing they were to be used, contrary to the statute, in manufacturing beer, could not recover. And Lord ELLENBOROUGH places it upon the ground that the statute was designed to protect the public health and the public revenue. And LEBLANC said, in delivering his opinion, that it "is an established principle, that the court will not lend its aid in order to enforce a contract

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entered into with a view of carrying into effect any thing which is prohibited by law." It has been held, that where a person sells goods, knowing that they are intended to be smuggled, he is not permitted by the policy of the law to recover on such a contract. *Briggs v. Lawrence*, 3 T. R. 454; *Olugus v. Pinckham*, 4 id. 406; *Waymell v. Reid*, 5 id. 599. In the decision of these cases, a number of other adjudged cases are referred to, which support and illustrate the rule. And *Wheeler v. Russell*, 17 Mass. 258, is to the same effect. Many other decisions could be referred to in support of the doctrine, were it deemed necessary.

This contract on the part of the insurance company is against the manifest policy of the law; is expressly made unlawful by the statute, and prohibited. It is, therefore, void, and of no effect. Notwithstanding the company have acted in contravention of the statute, and have no right to recover, we are not prepared to hold that the appellee has so acted that, had he sued upon the policy before repudiating it, he could not have recovered upon its breach. But that question is not now before the court, and, hence, it is not discussed or determined. The plea presented a good defense, and the demurrer was properly overruled, and the judgment of the recorder's court is affirmed.

Judgment affirmed.

**THE PEOPLE *ex rel.* HEMPSTEAD v. THE CHICAGO AND
ALTON R. R. Co.**

(55 ILL. 95.)

*Railroad company — duty of delivery beyond terminus — refusal to
receive freight.*

A railroad company refused to receive freight at a way station, to be delivered at an elevator five hundred feet beyond their terminus, on a track owned by another company, but which they had sometimes used for delivery at the elevator. *Held*, that a writ of *mandamus* would not lie compelling the company to receive freight for such delivery.

APPLICATION for a *mandamus*. The opinion states the case.

Goudy & Chandler, and *King, Scott & Payson*, for relators.

A. W. Church, J. H. Howe and *George C. Campbell*, for respondents.

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BREWER, C. This is an application for a peremptory *mandamus*, on the relation of Edward Hempstead and others against the Chicago and Alton Railroad Company.

In the petition of relators, it was prayed that a writ of *mandamus* issue, directed to this company, commanding them, their agents, officers and employees, to receive all grain which might be delivered to them at any of their receiving stations on the line of their road, consigned to the elevator of relators, and known as the Illinois River Elevator, in the city of Chicago, upon the payment of the usual and customary charges, without unfavorable discrimination, and to deliver all such grain at that elevator in due course of business and without unreasonable and unnecessary delay; and also commanding the agents, officers and employees of this company to receive and transport three certain car loads of corn from Odell to Chicago, and to deliver the same at this elevator, or show cause why they refuse so to do.

Respondents, by way of showing cause, have made an elaborate return to the writ, to which the relators have demurred, thus opening to our consideration the whole merits of the controversy.

It is not denied that relators own and operate the elevator, as alleged, and that they have all the necessary machinery and conveniences for the purposes to which it is devoted, nor is the fact denied that respondents own and operate the Chicago and Alton Railroad from East St. Louis to the city of Chicago, but they do deny that they are common carriers to the extent set up and claimed by the relators. The relators claim, that to and from East St. Louis, and all points intermediate that and the city of Chicago, on the line of their road, it is their legal duty to receive all goods and freights delivered to them at any station on their line, and to transport the same to such stations and places as may be directed by the consignor, for a reasonable price or reward, and to deliver them to the person or persons to whom they are directed to deliver them, and that it is also their duty to deliver all grain received by them in bulk, into the warehouse to which it is consigned; and that it is unlawful for them to deliver any grain into any warehouse other than that to which it is consigned, without the consent of the owner or consignee thereof.

The claim of the relators reaches to this extent. The objection to such a pretension is very obvious. It does not confine the legal duty of respondents to their own line of road. Beyond that this

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court has no power. Their duty is commensurate with their franchise, and cannot, by this court, be made to extend beyond it, and the demurrer admits that the south line of Madison street, as stated in the return, is the limit to which their franchise extends, while the elevator is north of that point some five hundred feet or more, entirely without the limits of respondents' charter.

But the relators say that a railroad track is laid down on West Water street, running by the elevator with a switch, by which the elevator can be approached to load and unload cars, and which track was laid under an ordinance of the city of Chicago, passed August 16, 1858, but that the particular part in front of the elevator, and the switch were constructed by the Pittsburgh, Fort Wayne and Chicago Railroad Company, and that, by the fourth section of that ordinance, respondents have the right to use this track, and, in fact, do use it; that they run all their cars upon a part of the track constructed under this ordinance, to reach their depots, and a run of five hundred feet beyond their passenger depot would bring the cars to relators' elevator.

To this it is answered by respondents, that they have never acquired any right to run their cars north of the south line of Madison street, the terminus of their railroad, and that none of their engines or cars have the right to pass north of this south line without obtaining permission of the railroad companies owning them, and paying to them such sum as may be charged for their use. And, they further say, they have no right to send their cars over the tracks leading to this elevator without special permission, and upon paying the owners of the tracks compensation therefor, and that they have never held themselves out to the public as common carriers beyond the termini of their own line of road, and that, whenever their cars have been permitted to go beyond the terminus of their road, it has been done by virtue of special agreements made to that effect; and they further say they have never accepted the provisions of the ordinance of the 16th of August, 1858; that while it may be true, as alleged, the Pittsburgh, Fort Wayne and Chicago Railroad Company, and the Chicago, St. Paul and Fond du Lac Railroad Company, did construct the tracks from Van Buren to Kinzie street, it is not true that respondents had any part in their construction, or have availed of the provisions of the fourth section of that ordinance for the use of the tracks so laid north of the south boundary line of Madison street; nor have they ever acquired, by agree-

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ment or otherwise, as provided by the terms of that ordinance, any right to run their trains north of that line; nor have they had any thing to do with the construction of any side or switch track connecting with any railroad track north of that boundary line in West Water street, or in any other street in Chicago north of Madison street.

Here, we think, is presented the pith of this controversy. The facts are admitted by the demurrer to be true, and the question is, can a railroad company, chartered with certain express powers and privileges, with certain termini between which they are to be exercised, be compelled to purchase, for the accommodation of the public, more extended privileges, beyond the limits of their franchise?

In the case of *Vincent et al.* against this same company, 49 Ill. 33, we took occasion, in defining the duty of common carriers as to delivery of articles carried, imposed by the common law, to advert to the relaxation of the rule in regard to railways.

We there said, the rule of the common law, requiring common carriers by land to deliver to the consignee, has been so far relaxed in regard to railways, from necessity, as, in most cases, to substitute, in place of a formal delivery, a delivery at the warehouse or depot provided by the companies for the storage of goods, and that the decisions of this court, that a railway company may discharge themselves of their liability as common carriers by safely depositing goods in their warehouse, and there holding them under the responsibilities of a warehouseman, until demanded by the consignee, proceed upon the ground that a railway has no means of delivery beyond its own lines.

We consider this quotation very apposite in the present case, for it is admitted by the pleadings that relators' elevator is not on the line of respondents' railway, and that they have no connection with it, or use of it, except such as they acquire by purchase when their own necessities or interests demand its use.

And in remarking on the custom which had grown up in this State, of carrying grain by rail in bulk, it is said, since it would be impossible for railroad companies to unload and store grain so brought, at their ordinary freight depots, a custom of delivering it at elevators has obtained, to which it may be consigned, but it is indispensable such elevators must be connected by some track with the railroad line, and be, in fact, a portion thereof, for such we understand to be the meaning of the opinion in that case. It could

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not be understood that, although these respondents have connection by sidings or switches, or other contrivances, with other roads running into Chicago, they should be compelled to use them to reach an elevator upon such road situate, it may be, miles beyond the *terminus* of their road, and not on the route of their own road. We know of no power which can compel a railroad company to exercise its franchise beyond its own *termini*. Within those limits, this court can exercise a supervisory power over them, and, as in Vincent's case, enjoin them. That proceeding was upheld, because the siding to their elevator was a part of the track of the respondents. In commenting upon the act of the legislature of February 22, 1867, entitled "Warehousemen," in answer to the argument of the respondents, that the act did not mean that railway companies shall deliver grain at points off their line, the court said, clearly it does not; but the question recurs, what points are to be considered on the line of a railway for the purposes of delivery under this law? They contend that its line consists of its main track, and such side tracks as may belong to it. The court said, when a railroad, for a valid consideration, has allowed the owner of adjacent land to lay a side track connecting with its own rails, and, as in the case then before it, had permitted the connection to be made, and the side track to be laid for the use of a particular lot of ground, and in order to transport to such lot heavy articles, and the owner of the lot and side track has his warehouse in readiness for the receipt of such freight, then such side track must be considered as a part of its line, for the purposes of delivery, under the statute.

In the same opinion it was conceded that a railway company could not be required, by legislative enactment, to transport freight beyond its own line.

This, we think, settles the matter in dispute between these parties, unless an additional obligation has been imposed upon these respondents by the ordinance of the city, of August 16, 1858.

It is admitted by the pleadings that respondents had no agency in constructing the tracks which pass by this elevator, and have never availed of the provisions contained in that ordinance, and have never authorized or permitted a connection with their line of road of any switch or side-track constructed on the street in which this elevator is situate, and it is further admitted that the lawful northern terminus of their road is the south line of Madison street.

If, then, by legislative enactment, a railroad company cannot be

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compelled to transport freight beyond their own line, with what propriety can it be urged that a permission to use tracks which they were not instrumental in connecting with their line, and which are beyond their terminus and the property of other parties, shall have a greater effect than a legislative enactment? Does the permission of the city authorities to use these tracks impose an obligation on the respondents to use them? If the legislature, with its vast powers, cannot so compel them, it would be strange, indeed, if the act of a subordinate authority should have that effect. The ordinance cited can have no other effect than to legalize a departure from their line of road, should the respondents desire to do so. Relators allege that respondents have the right to use this track, and, in fact, do use it; that they run all their cars upon a part of it to reach their depots, and a further run of five hundred feet beyond their passenger depot would bring them to this elevator. As a general fact, we believe cars with heavy freights, like grain in bulk, do not make the depot for passengers their stopping place. They usually stop at the freight depot, and that, judging from the diagram attached to the return, the accuracy of which is not questioned, must be more than five hundred yards south of this elevator. The fact that the respondents use this track is not denied in the return, but the respondents say, and that is admitted by the demurrer, that all these tracks laid in West Water street, and north of Madison street, are owned exclusively by the Chicago & Northwestern and the Pittsburgh, Fort Wayne & Chicago railroad companies, who control the manner of using them, and charge track service for every car run over them by respondents, and by other railroad companies. The respondents further say, and this is also admitted, that although they may have delivered coal over that switch, to that elevator, they have never done so except by special agreement made for that purpose.

That a railroad company may, by special agreement, run their cars over the track of another, is not doubted, but that they can be compelled to do so is not and cannot be admitted. If the ordinance of August, 1858, intended a favor to this and other companies, still, the companies cannot be coerced to accept the favor. So long as they perform their duties under the privileges and powers granted them, the people have no right to complain. To compel a railroad company to receive and deliver freight at points off and beyond their own line, would be not only oppressive, and involve their

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business in inextricable confusion, but would impose burdens and responsibilities upon them which they never contracted to assume. A reference to the diagram accompanying the return of respondents, and to which we have before referred, taken in connection with the statement in the return, which is admitted to be true, it will be seen, that all the tracks leading into West Water street belonged exclusively to the Pittsburgh, Fort Wayne and Chicago Railroad Company, while those owned by these respondents jointly with that company, as also those owned exclusively by respondents, all terminate at or near the south line of Madison street. The question, then, becomes pertinent, should a mandamus be awarded, how could respondents obey it? Could they, without the permission of the first-named company, run their cars over their tracks? Could the writ command them to purchase the right so to run them of that company? Can a writ of mandamus be made to perform such an office? Would this court be justified in so trenching upon the rights and franchise of the Pittsburgh, Fort Wayne and Chicago Railroad Company? They have chartered rights which cannot be infringed so long as they properly perform their duties under their contract, and it would be going to an unwarrantable extent, in order to compel one company to perform a supposed duty, to trespass upon the chartered privileges of another.

This court said, in *The People ex rel. v. Hatch*, and the *Same v. Dubois*, 33 Ill. 9, at page 140, that a mandamus should not issue in any case unless the party applying for it shall show a clear legal right to have the thing sought by it done, and in the manner and by the person or body sought to be coerced, and must be effectual as a remedy if enforced, and it must be in the power of the party, and his duty, also, to do the act sought to be done, and is never awarded unless the right of the relator is clear and undeniable, and the party sought to be coerced is bound to act. And in *The People, etc., v. Gilmer*, 5 Gilm. 242, it was held, that a mandamus could only be issued, to compel a party to act, when it was his duty to act without it — that the writ conferred upon him no new authority. And the duty must be a public one, and must be imperative and not discretionary. Tapping on Man. 65. This has peculiar application to the fourth section of the ordinance, so much insisted upon by relators. That section nowhere confers any rights upon respondents. As we understand its terms from respondents' brief, the ordinance not being before us, it provides, only, that the railroad companies to

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whom the right to lay down tracks in West Water street is given may associate with them in the construction and use of said tracks any other corporations, and shall allow and permit the use of said tracks by any other railroad corporation upon terms and conditions to be agreed upon.

It is admitted by the pleadings, that no agreement was ever made by the respondents for the use of these tracks. By the ordinance, it is discretionary with the companies to make such agreements. This court cannot compel respondents, if application was made to it, to enter into an agreement to use them. It is not their duty to make an agreement, it is a privilege only, and, consequently, the court cannot compel these respondents to use these tracks, or any one of them. In short, it cannot coerce a party to do what the law does not oblige him to do. Granting the writ would confer no power or authority upon respondents to enter upon and use these tracks. A plain dereliction of duty must be established before a mandamus can be awarded.

The ground of the decision in Vincent's case was, that the side-track, under the circumstances attending its construction, became a part of the track of the railroad company, and they were, therefore, bound to deliver grain, carried by them in bulk, to the warehouse erected upon it, when consigned to such warehouse.

The return in this case shows, and the fact is admitted by the demurrer, that the respondents have provided, by contract with other parties, a warehouse on their own track, ample in capacity to contain all grain ordinarily transported in bulk over their line of road, having all the necessary machinery and appliances for speedily receiving, unloading and returning the cars in which it is transported, and have guarded consignors of such articles against imposition, by a covenant that the charges made at such warehouse shall not exceed those of other warehouses in the city of Chicago. A delivery, therefore, of grain in bulk to such a warehouse, if not consigned to any other warehouse on the line of their road, would be a fulfillment of the obligation resting upon them to carry and deliver such freight.

So long as no discrimination is made by railroad companies between warehouses on their line of road, shippers can have no real cause of complaint. So long as their grain is properly handled and stored, and at the usual charges, it can make but little, if any, difference to them by whom those services are performed, or where,

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and if no warehouse upon the line of a railroad is designated by the consignor as the recipient, and as a delivery cannot be made at the usual freight-depot, what can be more reasonable and proper than a delivery to the warehouse they have furnished upon their own track, that being in all respects ample for the purpose. *Porter v. Chi. & R. I. R. R. Co.*, 20 Ill. 407. As they cannot be compelled to transport the grain beyond their track, or off it, so neither can they be compelled to receive it for such purpose. There is nothing in the warehousing act of 1867 opposed to this. The 22d section of that act clearly implies, that the warehouses designated by the consignors shall be upon the track of the road on which their grain is carried, and within the limits of its franchise. It never could have been the design of the act to compel one road to trespass on the chartered rights of another, or to purchase a privilege of the other.

It is urged by the respondents, in support of their return, that they have a right to refuse to receive grain in bulk, to be carried on their road, and can demand it shall be placed in proper packages, convenient for handling and storage in their cars, and for unloading.

When we consider the vast amount of grain annually produced for market in the rich country through which this road passes on its way to the great grain-market of the west, the difficulty, if not impossibility, of providing sacks, barrels, or other safe contrivances to secure properly this production for shipment, is quite apparent. This led to the establishment of costly elevators, and they induced the custom, which has obtained with all railroads, in this State, at least, to receive grain in bulk, it being equally as well protected in that condition in its transit by cars as in sacks, and as speedily unloaded from them, by means of the steam power and appropriate machinery employed by them. These erections have had the same powerful influence upon the production of wheat, one of our great staples, as the introduction of the reaper, for without the agency of the latter, those vast fields yearly blossoming with this product, would be devoted to other purposes, and but for the steam car and the elevator, if cultivated up to the limit of their capacity, their products could find no market. Hand in hand, these powerful influences are at work, and so long as the two latter make no unjust discriminations, and are satisfied with moderate charges, the stimulus to the agricultural interest will be unceasing, and nothing will

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be wanting to make this the great grain-growing State of the west, if not of the Union.

We are not of opinion that respondents, or any other railroad company, can disregard the custom of conveying grain in bulk over the line of their own road and delivering it at any elevator thereon to which it may be consigned. If consigned to an elevator or warehouse not on their road, and beyond their terminus, or there be no elevator on the road on which the grain is carried, then they may rightfully refuse to receive it in bulk.

The facts stated in respondents' return, and the legal consequences flowing from them, for the reasons we have given, afford a complete justification for the refusal to receive the grain in question, the elevator to which it was consigned not being on their road, or within the limits of their franchise. We have examined all the cases to which reference has been made, and we are well satisfied the views here expressed conflict, in no particular, with any of them.

The demurrer to the return must be overruled.

Mandamus refused.

SHELDON, J. I hold that so long as the respondents actually make use of the track leading to the relators' elevator, in running their cars over it, it is their duty to make delivery of grain there, under the rule laid down by this court in the case of *Vincent v. C. & A. R. R. Co.*, 49 Ill. 33.

SCOTT, J. I concur in denying the peremptory writ in this case, on the ground that the writ of mandamus is not the appropriate remedy for the wrong complained of. When the law affords another and complete remedy, I understand the law to be well settled that a writ of mandamus will never be awarded. On the state of facts presented by this record, the law furnishes a complete and ample remedy to the party injured.

Without discussing the case at length, I am of opinion, on the facts presented in the record, that it was the duty of the railroad company to receive the grain in question and deliver it at the relators' warehouse, and for that purpose the company had the clear right to use the track in question, and for a failure so to do they are liable in any appropriate common-law action.

WALKER, J. I concur in the opinion announced in this case, but hold that respondents, and all other railroad companies in the State

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may be compelled by mandamus, when a proper case is made, to carry grain in bulk, if such is the customary mode of transportation, and to deliver it to any elevator on the line of their roads, or upon any of their side-tracks or switches to which it may be consigned; and when such roads enter the city of Chicago, they should deliver grain therein in the same manner, when so consigned, on their own tracks, side-tracks or switches, and at the elevators to which consignments are made, on other roads in the city with which they have running arrangements, unless they would be compelled to incur unreasonable expense in making such delivery. But they are not, nor can they be, required to construct new side-tracks or switches, or extend the line of their roads, or to make running arrangements with other roads, or to purchase or lease other roads for the purpose of making such delivery.

CHICAGO AND NORTH WESTERN RAILWAY CO., appellants, v.
WILLIAMS.

(55 Ill. 185.)

Railroad company—regulations as to passengers. Measure of damages.

A railroad company set apart in its passenger trains a car for the exclusive use of ladies and gentlemen accompanied by ladies. A colored woman was excluded from the car on account of her color. *Held*, that the company was liable in damages, and that \$200 was not excessive in view of the indignity and delay of the exclusion.

ACTION to recover damages for plaintiff's exclusion from a railway car belonging to defendants. The opinion states the facts. At the trial judgment for plaintiff was rendered for \$200. Defendants appealed.

James M. Wight, for appellants.

E. W. Blaisdell, Jr., and *C. F. Miller*, for appellee.

SCOTT, J. There is but one question of any considerable importance presented by the record in this case.

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It is simply, whether a railroad company, which, by our statute and the common law, is a common carrier of passengers, in a case where the company, by their rules and regulations, have designated a certain car in their passenger train for the exclusive use of ladies, and gentlemen accompanied by ladies, can exclude from the privileges of such car a colored woman, holding a first-class ticket, for no other reason except her color.

The evidence in the case establishes these facts: That, as was the custom on appellants' road, they had set apart in their passenger trains a car for the exclusive use of ladies, and gentlemen accompanied by ladies, and that such a car, called the "ladies' car," was attached to the train in question. The appellee resided at Rockford, and being desirous of going from that station to Belvidere, on the road of appellants, for that purpose purchased of the agent of the appellants a ticket, which entitled the holder to a seat in a first-class car on their road. On the arrival of the train at the Rockford station, the appellee offered and endeavored to enter the ladies' car, but was refused permission so to do, and was directed to go forward to the car set apart for and occupied mostly by men. On the appellee persisting on entering the ladies' car, force enough was used by the brakeman to prevent her. At the time she attempted to obtain a seat in that car, on appellants' train, there were vacant and unoccupied seats in it, for one of the female witnesses states that she, with two other ladies, a few moments afterward, entered the same car at that station and found two vacant seats, and occupied the same. No objection whatever was made, nor is it insisted any other existed, to appellee taking a seat in the ladies' car, except her color. The appellee was clad in plain and decent apparel, and it is not suggested, in the evidence or otherwise, that she was not a woman of good character and proper behavior.

It does not appear that the company had ever set apart a car for the exclusive use, or provided any separate seats for the use of colored persons who might desire to pass over their line of road. The evidence discloses that colored women sometimes rode in the ladies' car, and sometimes in the other car, and there was, in fact, no rule or regulation of the company in regard to colored passengers.

The case turns somewhat on what are reasonable rules, and the power of railroad companies to establish and enforce them.

It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of passengers

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traveling on their lines of road. It is not only their right, but it is their duty to make such rules and regulations. It is alike the interest of the companies and the public that such rules should be established and enforced, and ample authority is conferred by law on the agents and servants of the companies to enforce all reasonable regulations made for the safety and convenience of passengers.

It was held, in the case of the *Ill. Cent. R. R. Co. v. Whittemore*, 43 Ill. 423, that, for a non-compliance with a reasonable rule of the company, a party might be expelled from a train at a point other than a regular station.

If a person on a train becomes disorderly, profane or dangerous and offensive in his conduct, it is the duty of the conductor to expel such guilty party, or at least to assign him to a car where he will not endanger or annoy the other passengers. Whatever rules tend to the comfort, order and safety of the passengers, the company are fully authorized to make, and are amply empowered to enforce compliance therewith.

But such rules and regulations must always be reasonable and uniform in respect to persons.

A railroad company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position or their political or religious beliefs. Whatever discriminations are made, must be on some principle, or for some reason, that the law recognizes as just and equitable, and founded in good public policy. What are reasonable rules is a question of law, and is for the court to determine, under all the circumstances in each particular case.

In the present instance, the rule that set apart a car for the exclusive use of ladies, and gentlemen accompanied by ladies, is a reasonable one, and the power of the company to establish it has never been doubted.

If the appellee is to be denied the privilege of the "ladies' car," for which she was willing to pay, and had paid, full compensation to the company, a privilege which is accorded alike to all women, whether they are rich or poor, it must be on some principle or under some rule of the company that the law would recognize as reasonable and just. If she was denied that privilege by the mere caprice of the brakeman and conductor, and under no reasonable rule of the company, or, what is still worse, as the evidence would indicate, through mere wantonness on the part of the brakeman, then it was unreasonable, and therefore unlawful. It is not pre-

tended that there was any rule that excluded her, or that the managing officers of the company had ever given any directions to exclude colored persons from that car. If, however, there was such a rule, it could not be justified on the ground of mere prejudice. Such a rule must have for its foundation a better and a sounder reason, and one more in consonance with the enlightened judgment of reasonable men. An unreasonable rule, that effects the inconvenience and comfort of passengers, is unlawful, simply because it is unreasonable. *The State v. Overton*, 4 Zab. 435.

In the case of the *West Chester and Philadelphia R. R. Co. v. Miles*, 55 Penn. 209, it was admitted that no one could be excluded from a carriage by a public carrier on account of color, religious belief, political relations or prejudice, but it was held not to be an unreasonable regulation to seat passengers so as to preserve order and decorum, and prevent contacts and collisions arising from well-known repugnances, and, therefore, a rule that required a colored woman to occupy a separate seat in a car furnished by the company, equally as comfortable and safe as that furnished for other passengers, was not an unreasonable rule.

Under some circumstances, this might not be an unreasonable rule.

At all events, public carriers, until they do furnish separate seats equal in comfort and safety to those furnished for other travelers, must be held to have no right to discriminate between passengers on account of color, race or nativity, alone.

We do not understand that the appellee was bound to go forward to the car set apart for and occupied mostly by men, when she was directed by the brakeman. It is a sufficient answer to say, that that car was not provided by any rule of the company for the use of women, and that another one was. This fact was known to the appellee at the time. She may have undertaken the journey alone in view of that very fact, as women often do.

The above views dispose of all the objections taken to the instructions given by the court on behalf of the appellee, and the refusal of the court to give those asked on the part of the appellants, except the one which tells the jury that they may give damages above the actual damages sustained, for the delay, vexation and indignity to which the appellee was exposed, if she was wrongfully excluded from the car. If the party in such case is confined to the actual pecuniary damages sustained, it would, most often, be no compensation at all, above nominal damages, and no salutary effect would be produced

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on the wrong-doer by such a verdict. But we apprehend that, if the act is wrongfully and wantonly committed, the party may recover, in addition to the actual damages, something for the indignity, vexation and disgrace to which the party has been subjected.

It is insisted that the damages are excessive, in view of the slight injury sustained.

There is evidence from which the jury could find that the brakeman treated the appellee very rudely, and placed his hand on her and pushed her away from the car. The act was committed in a public place, and whatever disgrace was inflicted on her was in the presence of strangers and friends. The act was, in itself, wrongful, and without the shadow of a reasonable excuse, and the damages are not too high. The jury saw the witnesses, and heard their testimony, and with their finding we are fully satisfied.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* O'CONNELL V. TURNER.

(55 ILL. 280.)

Constitutional law. Parent and child — right of parent.

An act of the legislature of Illinois authorized the commitment to a "reform school" of children between six and sixteen years of age who are "vagrants or destitute of proper parental care, or are growing up in mendicancy, idleness or vice," to remain until reformed or until the age of twenty-one. On the application of the father of a child so committed, *held*, that the child must be discharged, the act being unconstitutional, and the commitment not being for any criminal offense.

APPLICATION for writ of *habeas corpus*. The opinion states the case.

Nissen & Barnum, M. F. Heenan and Wm. F. Butler, for relator.

M. F. Tuley and I. N. Stiles, for respondent.

THORNTON, J. By the order of this court, the writ of *habeas corpus* was issued, commanding Robert Turner, superintendent of

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the reform school of the city of Chicago, to show cause for the caption and detention of Daniel O'Connell.

The petition of Michael O'Connell represents that he is the father of Daniel, a boy between fourteen and fifteen years of age, and that he is restrained of his liberty contrary to the law, without conviction of crime, and under color of the following mittimus:

SUPERIOR COURT OF COOK COUNTY, SEPTEMBER TERM, 1870.

STATE OF ILLINOIS, }
Cook county. } ss:

The People of the State of Illinois to the Superintendent of the Reform School of the city of Chicago, greeting:

We do hereby command you, that you take the body of Daniel O'Connell, a boy above the age of six and under the age of sixteen years, who, upon due examination by the Hon. Wm. A. Porter, one of the judges of the superior court of Cook county, has been found, by competent evidence, to be a proper subject for commitment in the said reform school, and whose moral welfare and the good of society require that he should be sent to said school for instruction, employment and reformation, and that you confine the said Daniel O'Connell within the said reform school, according to the statute in such cases made and provided, and for so doing this shall be your sufficient warrant.

To the sheriff of Cook county to execute.

Witness, Augustus Jacobson, clerk of our said superior court, and the seal thereof, this 9th day of September, A. D. 1870.

A. JACOBSON, *Clerk.*

The return is, that the boy had been detained by authority of the mittimus which accompanied the petition, the original of which was filed with an indorsement thereon by the sheriff of its due execution, by the delivery of the "body of the prisoner to the superintendent of the reform school."

It is admitted that the relator is the father of the boy alleged to be restrained of his liberty, and that he is of the age stated.

The only question for determination is the power of the legislature to pass the laws under which this boy was arrested and confined.

The first act in relation to this "reform school" is a part of the charter of the city of Chicago, approved February 13, 1863, and the

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second is entitled "An act in reference to the reform school of the city of Chicago," approved March 5, 1867.

The first section establishes "a school for the safe keeping, education, employment and reformation of all children between the ages of six and sixteen years who are destitute of proper parental care, and growing up in mendicancy, ignorance, idleness or vice."

Section 4 of the act of 1867 provides, that "whenever any police magistrate, or justice of the peace, shall have brought before him any boy or girl within the ages of six or sixteen years, who he has reason to believe is a vagrant, or is destitute of proper parental care, or is growing up in mendicancy, ignorance, idleness or vice," he shall cause such boy or girl to be arrested, and, together with the witnesses, taken before one of the judges of the superior or circuit court of Cook county. The judge is empowered to issue a summons, or order in writing, to the child's father, mother, guardian, or whosoever may have the care of the child, in the order named, and if there be none such, to any person, at his discretion, to appear, at a time and place mentioned, and show cause why the child should not be committed to the "reform school," and, upon return of due service of the summons, an investigation shall be had. The section then directs, "if, upon such examination, such judge shall be of opinion that said boy or girl is a proper subject for commitment to the reform school, and that his or her moral welfare, and the good of society, requires that he or she should be sent to said school for employment, instruction and reformation, he shall so decide, and direct the clerk of the court of which he is judge to make out a warrant of commitment to said reform school, and such child shall thereupon be committed."

Section 9 of the act of 1863 directs that all persons between six and sixteen years of age, convicted of crime punishable by fine or imprisonment, who, in the opinion of the court, would be proper subjects for commitment, shall be committed to said school.

Section 10 authorizes the confinement of the children, and that they "shall be kept, disciplined, instructed, employed and governed," until they shall be reformed and discharged, or shall have arrived at the age of twenty-one years; and that the sole authority to discharge shall be in the board of guardians.

The warrant of commitment does not indicate that the arrest was made for a criminal offense. Hence, we conclude that it was issued

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under the general grant of power, to arrest and confine for misfortune.

The contingencies enumerated, upon the happening of either of which the power may be exercised, are vagrancy, destitution of proper parental care, mendicancy, ignorance, idleness or vice. Upon proof of any one, the child is deprived of home, and parents, and friends, and confined for more than half of an ordinary life. It is claimed that the law is administered for the moral welfare and intellectual improvement of the minor, and the good of society. From the record before us, we know nothing of the management. We are only informed that a father desires the custody of his child; and that he is restrained of his liberty. Therefore, we can only look at the language of the law, and the power granted.

What is proper parental care? The best and kindest parents would differ, in the attempt to solve the question. No two scarcely agree; and when we consider the watchful supervision, which is so unremitting over the domestic affairs of others, the conclusion is forced upon us, that there is not a child in the land who could not be proved, by two or more witnesses, to be in this sad condition. Ignorance, idleness, vice, are relative terms. Ignorance is always preferable to error, but, at most, is only venial. It may be general or it may be limited. Though it is sometimes said, that "idleness is the parent of vice," yet the former may exist without the latter. It is strictly an abstinence from labor or employment. If the child perform all its duties to parents and to society, the State has no right to compel it to labor. Vice is a very comprehensive term. Acts, wholly innocent in the estimation of many good men, would, according to the code of ethics of others, show fearful depravity. What is the standard to be? What extent of enlightenment, what amount of industry, what degree of virtue, will save from the threatened imprisonment? In our solicitude to form youth for the duties of civil life, we should not forget the rights which inhere both in parents and children. The principle of the absorption of the child in, and its complete subjection to the despotism of, the State, is wholly inadmissible in the modern civilized world.

The parent has the right to the care, custody and assistance of his child. The duty to maintain and protect it is a principle of natural law. He may even justify an assault and battery, in the defense of his children, and uphold them in their law suits. Thus, the law recognizes the power of parental affection, and excuses acts, which,

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in the absence of such a relation, would be punished. Another branch of parental duty, strongly inculcated by writers on natural law, is the education of children. To aid in the performance of these duties, and enforce obedience, parents have authority over them. The municipal law should not disturb this relation, except for the strongest reasons. The ease with which it may be disrupted under laws in question; the slight evidence required, and the informal mode of procedure, make them conflict with the natural right of the parent. Before any abridgment of the right, gross misconduct or almost total unfitness on the part of the parent, should be clearly proved. This power is an emanation from God, and every attempt to infringe upon it, except from dire necessity, should be resisted in all well-governed States. "In this country, the hope of the child, in respect to its education and future advancement, is mainly dependent upon the father; for this he struggles and toils through life; the desire of its accomplishment operating as one of the most powerful incentives to industry and thrift. The violent abruption of this relation would not only tend to wither these motives to action, but necessarily, in time, alienate the father's natural affections."

But even the power of the parent must be exercised with moderation. He may use correction and restraint, but in a reasonable manner. He has the right to enforce only such discipline as may be necessary to the discharge of his sacred trust; only moderate correction and temporary confinement. We are not governed by the twelve tables which formed the Roman law. The fourth table gave fathers the power of life and death, and of sale over their children. In this age and country such provisions would be atrocious. If a father confined or imprisoned his child for one year, the majesty of the law would frown upon the unnatural act, and every tender mother and kind father would rise up in arms against such monstrous inhumanity. Can the State, as *parens patriæ*, exceed the power of the natural parent, except in punishing crime?

These laws provide for the "safe keeping" of the child; they direct his "commitment," and only a "ticket of leave," or the uncontrolled discretion of a board of guardians will permit the imprisoned boy to breathe the pure air of heaven outside his prison walls, and to feel the instincts of manhood by contact with the busy world. The mittimus terms him "a proper subject for commitment;" directs the superintendent to "take his body," and the sheriff indorses

upon it, "executed by delivering the body of the within-named prisoner." The confinement may be from one to fifteen years, according to the age of the child. Executive clemency cannot open the prison doors, for no offense has been committed. The writ of *habeas corpus*, a writ for the security of liberty, can afford no relief, for the sovereign power of the State, as *parens patriæ*, has determined the imprisonment beyond recall. Such a restraint upon natural liberty is tyranny and oppression. If, without crime, without the conviction of any offense, the children of the State are to be thus confined for the "good of society," then society had better be reduced to its original elements, and free governments acknowledged a failure.

In cases of writs of *habeas corpus* to bring up infants, there are other rights beside the rights of the father. If improperly or illegally restrained, it is our duty, *ex debito justitiæ*, to liberate. The welfare and rights of the child are also to be considered. The disability of minors does not make slaves or criminals of them. They are entitled to legal rights, and are under legal liabilities. An implied contract for necessities is binding on them. The only act which they are under a legal incapacity to perform is the appointment of an attorney. All their other acts are merely voidable or confirmable. They are liable for torts, and punishable for crime. Lord KENYON said: "If an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice." Every child over ten years of age may be found guilty of crime. For robbery, burglary or arson, any minor may be sent to the penitentiary. Minors are bound to pay taxes for the support of the government, and constitute a part of the militia, and are compelled to endure the hardship and privation of a soldier's life in defense of the constitution and the laws; and yet it is assumed that to them liberty is a mere chimera. It is something of which they may have dreamed, but have never enjoyed the fruition.

Can we hold children responsible for crime; liable for their torts; impose onerous burdens upon them, and yet deprive them of the enjoyment of liberty, without charge or conviction of crime? The bill of rights declares that "all men are, by nature, free and independent, and have certain inherent and inalienable rights — among these are life, liberty, and the pursuit of happiness." This language is not restrictive; it is broad and comprehensive, and declares a grand truth — that "all men," all people, everywhere, have the inherent and inalienable right to liberty. Shall we say to the chil-

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dren of the State, you shall not enjoy this right — a right independent of all human laws and regulations? It is declared in the constitution; is higher than constitution and law, and should be held forever sacred.

Even criminals cannot be convicted and imprisoned without due process of law — without a regular trial, according to the course of the common law. Why should minors be imprisoned for misfortune? Destitution of proper parental care, ignorance, idleness and vice, are misfortunes, not crimes. In all criminal prosecutions against minors, for grave and heinous offenses, they have the right to demand the nature and cause of the accusation, and a speedy public trial by an impartial jury. All this must precede the final commitment to prison. Why should children, only guilty of misfortune, be deprived of liberty without “due process of law?”

It cannot be said, that in this case there is no imprisonment. This boy is deprived of a father's care; bereft of home influences; has no freedom of action; is committed for an uncertain time; is branded as a prisoner; made subject to the will of others, and thus feels that he is a slave. Nothing could more contribute to paralyze the youthful energies, crush all noble aspirations, and unfit him for the duties of manhood. Other means of a milder character; other influences of a more kindly nature; other laws less in restraint of liberty, would better accomplish the reformation of the depraved, and infringe less upon inalienable rights.

It is a grave responsibility to pronounce upon the acts of the legislative department. It is, however, the solemn duty of the courts to adjudge the law, and guard, when assailed, the liberty of the citizen. The constitution is the highest law; it commands and protects all. Its declaration of rights is an express limitation of legislative power, and as the laws under which the detention is had are in conflict with its provisions, we must so declare.

It is, therefore, ordered, that Daniel O'Connell be discharged from custody.

Discharged.

Town of Waltham v. Kemper.

TOWN OF WALTHAM, appellant, v. KEMPER.

(55 Ill. 344.)

Municipal corporation — Liability for injuries caused by defective highway.

A town is not liable to a private action for injuries sustained by a traveler in consequence of neglect to repair a highway.

ACTION against a town for injuries sustained by plaintiff, a traveler, on one of the highways in defendant town. The opinion states the case.

Glover, Cook & Campbell, M. E. Hollister and A. J. Grover, for appellant.

Bushnell & Avery, for appellee.

BRESE, J. Jacob Kemper complained in an action on the case, against the town of Waltham, in La Salle county, that by reason of not keeping in repair a certain public highway in said town, which it was their duty to keep in repair, his team and wagon, loaded with goods and chattels, was unavoidably mired, he using due care, and that, in extricating his team and himself from the mire and mud, he became wet and chilled, occasioning sickness, etc., and he so remained for a long time, suffering great pain, and was thereby prevented from attending to his ordinary business.

The plea was the general issue. There was a trial by jury, and a verdict for the plaintiff on which the court rendered judgment, to reverse which the town appeals.

The only question important to be considered is the liability of the town.

The case relied on by appellee to sustain the judgment, is *The Town of South Ottawa v. Foster*, 20 Ill. 296. That case came before this court by writ of error to the circuit court of La Salle county, and various errors were assigned, the first of which was overruling the demurrer to the declaration.

It was an action on the case, to recover damages against the town of South Ottawa for injuries resulting to a team of horses and wagon of the plaintiff, by falling off an embankment at the end of a bridge

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over Covel creek, in that town, on the allegation that it was the duty of the town to keep the embankment in repair, averring a neglect of that duty.

The cause was not elaborately argued, and the decision of the court, without as much examination as should have been bestowed, was based entirely on the provisions of articles 22, 23 and 24 of the township organization law of 1851 (Scates' Comp. 324), which we then thought, by a fair construction of their provisions, especially those of article 22, imposed a liability on the town, which, on their failure to properly discharge, subjected the town to an action for damages. No reference or allusion was made in the argument to a difference in this respect between corporations created for their own benefit, and the inhabitants of a district invested by statute, *in invitum*, with particular powers, making them corporations without their consent.

It was argued in that case, that the town was a corporation, created by statute, capable of suing and being sued; that they were bound by statute to keep the public highways in repair; that they had power to levy taxes for such purpose, and for a dereliction of such duty they were liable in damages to the plaintiff. In the consideration given that case, the distinction was not drawn, which seems to have been acknowledged by some courts, between corporations, such as cities created for their own benefit, and towns established by law as civil divisions of a county, merely, and in which the inhabitants had no agency or participation. The former are held to stand on the same ground as individuals, and have no exemptions from liability except such as may be given them by their charters.

The reason for the distinction is adverted to by this court in *Browning v. The City of Springfield*, 17 Ill. 143, and it is this: that a municipality, by voluntarily accepting a charter, impliedly contracts on their part to perform all the duties imposed on them, and they are made of perfect obligation by being clothed with all the power and authority necessary to their full performance; and, in this respect, there is no difference between such a corporation and a private corporation or individual, who had received from the sovereign power a valuable grant, charged with conditions. At the common law, actions are maintainable against such, but ever since the case of *Russell et al. v. The Men dwelling in the County of Devon*, 2 Term R. 671, it has been held, with but a few exceptional cases, that towns or counties, though corporations, but existing as such

only for the purposes of the general political government of the State, are not liable at the common law for actions for neglect of duty, and can only be made liable by statute. It was on the authority of this case that *Hedges v. The County of Madison*, 1 Gilm. 567, was decided. The departure from the ruling in this case in *South Ottawa v. Foster, supra*, was doubtless owing to a supposed difference between the authorities of towns, and their powers and duties in regard to public highways, and those of counties.

We are satisfied in this respect there is no difference, and the case of *Hedges v. The County of Madison* must be held to apply to towns, they being the same kind of corporations as counties, and created, *in invitum*, for certain political or governmental purposes, and the former having no greater power, by statute, over roads and bridges than the latter had.

That case holds that the duties to be performed by a county are for the benefit of the public, intimating that the remedy for neglecting to perform them must be by public indictment, and that no private action by an individual claiming to have been injured by the neglect will lie, unless it is given by statute.

In the case of these *quasi* corporations, made so without their consent, duties may be imposed, and their performance compelled under penalties; but the corporators who are made such, *nolens volens*, are not, and cannot be considered, in the light of persons who have voluntarily and for a consideration assumed obligations, so as to owe a duty to every person interested in the performance. Cooley's Const. Lim. 247. Referring to *Mower v. Leicester*, 9 Mass. 250; *Bartlett v. Crozier*, 17 Johns. 439; *Farnum v. Town of Concord*, 2 N. H. 392; *Adams v. Wiscasset Bank*, 1 Greenl. 361; *Baxter v. Winoski Turnpike*, 22 Vt. 123; *Eastman v. Meredith*, 36 N. H. 284, and many other cases, all following the ruling in *Russell v. The Men of Devon, supra*.

The reason which exempts these public bodies from liability to private actions, based upon neglect to perform a public duty, does not apply to villages, boroughs and cities, which accept special charters from the State. The grant of the corporate franchise, in those cases, is usually made only at the request of the citizens to be incorporated, and it is justly assumed that it confers a valuable privilege, and which is held to be a consideration for the duties imposed by the charter. By those charters, larger powers of self government are conferred than those confided to towns or counties; larger privi-

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leges in the acquisition and control of corporate property, and special authority is given them to make use of the public highways for the special and peculiar convenience of the citizens of the municipality in various modes not permissible elsewhere. These grants raise an implied promise on the part of the corporation to perform their corporate duties, and it inures to the benefit of every individual interested in its performance. Id. 248.

It is upon this theory the cases of *Browning v. The City of Springfield*, *supra*; *City of Joliet v. Verley*, 35 Ill. 58; *City of Bloomington v. Bay*, 42 id. 503; *City of Springfield v. Le Claire*, 49 id. 476, are sustainable; and though other courts of great respectability, among them the supreme court of Michigan, by a majority decision, repudiate these considerations, we think they are founded in good reason; and have received the sanction of other courts of the highest authority. The leading English cases are referred to in *Browning v. The City of Springfield*, *supra*; *Mayor of Lynn v. Turner*, Cowper, 86; *The Mayor and Burgesses of Lyme Regis v. Henley*, 3 Barn. & Adol. 77 (23 Eng. C. L. 32); *Weat v. Brockport*, 16 N. Y. 161; *Hutson v. New York*, 9 id. 163; *Conrad v. Trustees of Ithaca*, 16 id. 158; *Storrs v. City of Utica*, 17 id. 104; *Mills v. City of Brooklyn*, 32 id. 489; *Lee v. Village of Sandy Hill*, 4 id. 442; *Meares v. Town of Wilmington*, 9 Ired. 73; *Pittsburgh v. Grier*, 22 Penn. 54; *Smoot v. The Mayor of Wetumpka*, 24 Ala. 112, and numerous other cases are referred to by Mr. Justice COOLEY, in his dissenting opinion in the Michigan case, *City of Detroit v. Blakeby*, 2 Alb. Law J., No. 46, p. 396. See, also, *Sutton et al. v. The Board of Police of Carrol County*, 41 Miss. 236.

We are satisfied, on principle and authority, the town of Waltham was not liable to this action at common law, and none has been given by statute. The court, therefore, should have allowed the motion in arrest of judgment, the declaration disclosing no liability. It was error to refuse the motion, and for the error the judgment must be reversed and the cause remanded.

Judgment reversed.

BRADLEY, appellant, v. BALLARD.

(55 ILL. 412.)

Corporations — acts ultra vires.

A mining corporation was organized under a statute requiring the operations of the corporation to be carried on in Illinois. The corporation afterward engaged in mining in Colorado, and in the prosecution of its work borrowed large sums of money, for which notes of the corporation were given. *Held*, that a stockholder could not enjoin the collection of the notes, the doctrine of *ultra vires* not applying.

BILL in chancery. The opinion states the case.

Knowlton, Jameison & Scales, for appellant.

George Herbert and *George G. Bellows*, for appellee.

LAWRENCE, C. J. This was a bill in chancery, brought by Bradley, against Ballard and others, for the purpose of enjoining the prosecution of a suit pending in the circuit court of Cook county, against a corporation called "The North Star Gold and Silver Mining Company," in which complainant was a stockholder, upon certain promissory notes given by said company, and also to cancel certain other notes not yet in suit. The court sustained a demurrer to the bill, and, the complainant not asking to amend, a decree of dismissal was entered.

It appears, by the averments in the bill, that various persons associated themselves together in the city of Chicago, in the year 1866, and filed their articles of organization in the circuit court of Cook county, under the general incorporation law, whereby they became incorporated under the title above stated. The statute requires the certificate to state the town and county in which the operations of a company thus incorporated are to be carried on, and the certificate of this company stated that their operations were to be carried on in the city of Chicago, in the county of Cook and State of Illinois. It further appears from the bill that the company thus organized engaged in mining in the Territory of Colorado, and in the prosecution of that work borrowed large sums of money, for which the notes

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described in the bill were given, except some that are alleged to have been given for official salaries. It is not claimed that they were not given for a full and fair consideration, but their cancellation is sought upon the ground that they were given for money borrowed to enable the company to prosecute a business which it had no power to prosecute, and that this purpose was known to the lenders of the money. It is insisted that, although the business of the corporation was mining, yet, by the terms of its certificate, it had no power to prosecute that business beyond the limits of the city of Chicago, or certainly not beyond the limits of this State.

Whether this is the proper construction of the statute is a question we do not find it necessary to decide. Conceding that it is, and that this corporation had no power to engage in mining in Colorado, we are still of opinion the complainant has not, by his bill, entitled himself to relief. He became a stockholder to the extent of \$25,000, and from the name and character of the company he must have known it was organized for the purpose of mining beyond the limits of this State. He subsequently became one of the directors of said company, and it is a legitimate inference, from the bill, that at least a part of these debts were created while he was thus participating in the control of the company. There is no pretense in the bill that he ever, in any mode, objected to the mining operations of the company in Colorado, or to the borrowing of money therefor, and the fair, and, indeed, unavoidable inference, from the nature of the company, the connection of complainant with it, and the silence of the bill in this regard is, that he did not object. On what ground, then, can he ask a court of equity to enjoin the collection of these notes?

It is said by counsel for complainant that a corporation is not estopped to say, in its defense, that it had not the power to make a contract sought to be enforced against it, for the reason that, if thus estopped, its powers might be indefinitely enlarged. While the contract remains unexecuted on both sides, this is undoubtedly true, but when, under cover of this principle, a corporation seeks to evade the payment of borrowed money, on the ground that, although it had power to borrow money, it expended the money borrowed in prosecuting a business which it was not authorized to prosecute, it is pressing the doctrine of *ultra vires* to an extent that can never be tolerated, even though the lender of the money knew that the corporation was transacting a business beyond its chartered powers, and

that his money would be used in such business, provided the business itself was free from any intrinsic immorality or illegality.

Neither is it correct to say that the application to corporations of the doctrine of equitable estoppel, where justice requires it to be applied, as when, under a claim of corporate power, they have received benefits for which they refuse to pay, from a sudden discovery that they had not the powers they had claimed, can be made the means of enabling them indefinitely to extend their powers. If that were true, it would be an insuperable objection to the application of the doctrine, even for the purpose of preventing injustice in individual cases. But it is not true. This doctrine is applied only for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act, *ultra vires*, has been accomplished. But while a contract remains executory, it is perfectly true that the powers of corporations cannot be extended beyond their proper limits, for the purpose of enforcing a contract. Not only so, but on the application of a stockholder, or of any other person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*. So, too, if a contract, *ultra vires*, is made between a corporation and another person, and, while it is yet wholly unexecuted, the corporation recedes, the other contracting party would probably have no claim for damages. But if such other party proceeds in the performance of the contract, expending his money and his labor in the production of values which the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its power.

Take, for example, the case of a corporation chartered to build a railway from Chicago to Rock Island. Under such a charter, the company would have no power to build steamboats for the purpose of running a line of such vessels between Rock Island and St. Louis. But suppose the company, notwithstanding the want of power, should make a contract for the building of a vessel, and it is built by the contractor, and accepted and used by the railway, could any court permit the corporation, when sued for the value of the vessel, to excuse itself from payment on the ground that, although it has and uses the steamer, it had no authority to do so by its charter? Or, suppose that, instead of having a vessel built by a contractor, it employs a superintendent to build it, and hires mechan

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ics by the day, could it escape the payment of their wages on the ground that it had employed them in a work *ultra vires*?

In cases of such character, courts simply say to corporations, you cannot, in this case, raise the question of your power to make the contract. It is sufficient that you have made it, and by so doing have placed in your corporate treasury the fruits of others' labor, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter.

We are aware that cases may be cited in apparent conflict with the principles here announced, but the tendency of recent decisions is in harmony with them. While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit. This is demanded by the plainest principles of justice. 2 Kent (11th ed.), 381, note; *Zabriskie v. C. C. and C. R. R. Co.*, 23 How. (U. S.) 381; *Bissell v. M. S. and N. I. R. R. Co.*, 22 N. Y. 258; *Cary v. Cleveland and Toledo R. R. Co.*, 29 Barb. 35; *Parish v. Wheeler*, 22 N. Y. 494; *Graff v. Am. Lin. Th. Co.*, 21 id. 124; *Argenti v. San Francisco*, 16 Cal. 255; *McCluer v. Manchester and L. R.*, 13 Gray, 124; *Chapman v. M. R. and L. R. R. Co.*, 6 Ohio, 137; *Hall v. Mut. Fire Ins. Co.*, 32 N. H. 297; *Railroad Co. v. Howard*, 7 Wall. 413.

If the complainant in this case had, as a stockholder, asked a court of chancery to enjoin this corporation from mining in Colorado, it would have examined the charter, and if it had arrived at the conclusion that such mining was beyond the powers derived from filing the certificate in question, under our statute, would have issued the injunction. But this he did not do. On the contrary, he has participated in the work, and so long as there was hope of gain, he was willing the money should be borrowed by which the work was to be carried forward. The borrowing of the money was not, in itself, an act *ultra vires*, nor was the giving of the notes. The money was not borrowed to be used for an illegal or immoral purpose. The lenders have been guilty of no violation of law, nor wrong of any kind. The corporation has received their money and used it for a purpose, which, whether *ultra vires* or not, was unquestionably the sole purpose for which the corporators associated themselves together, and for which this complainant became a stock-

holder. Justice requires the corporation to repay the money it has thus borrowed and expended.

What we have said applies only to private corporations, organized for pecuniary gain. If, to increase their profits, they embark in enterprises not authorized by their charter, still, as to third persons, and when necessary for the advancement of justice, the stockholders will be presumed to have assented, since it is in their power to restrain their officers when they transgress the limits of their chartered authority. But municipal corporations stand upon a different ground. They are not organized for gain, but for the purpose of government, and debts illegally contracted by their officers cannot be made binding upon the tax payers, from the presumed assent of the latter.

There are some vague charges in the bill, of conspiracy, between the holders of the notes upon which suit has been brought and some of the directors, but no facts are alleged showing, or tending to show, any wrongful or fraudulent intent. The alleged conspiracy seems merely to be an understanding between the holders of the notes and the majority of the directors, by which the latter will allow the former to obtain judgment on their notes, and we do not perceive why they should not. If the complainant has had the misfortune to associate himself with persons of less pecuniary responsibility than himself, for the purpose of carrying on a hazardous business, in which heavy debts have been incurred, it is a misfortune of which the courts cannot relieve him, merely on a vague and general charge of conspiracy against his fellow stockholders or directors. No facts are alleged in this bill which can be made the foundation of relief. As before remarked, the counsel of appellant has presented his case simply on the question of corporate power. We are of opinion the demurrer was properly sustained to the bill.

Decree affirmed.

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THE CHICAGO & NORTHWESTERN RAILWAY Co., appellant, v.
JACKSON.

(55 ILL. 422.)

Master and servant — liability of railroad company for injuries to employee — measure of damages.

A brakeman on a railroad, in the discharge of his duty, while descending a defective ladder on a freight car, fell, and was crushed by the engine so that amputation of his legs was necessary. *Held*, that the company was liable unless the brakeman was negligent, or unless he knew, or might have known, of the defect in the ladder, which was a question for the jury; but that \$18,000 was excessive damages, because, after deducting expenses, this sum, at interest, would produce, annually, more than the brakeman could have expected to earn, had he not been disabled.

ACTION to recover for injuries received by plaintiff while brakeman on defendant's railway. The opinion states the case.

A. M. Herrington, for appellants.

Blanchard & Silver and *Joslyn & Slavin*, for appellee.

WALKER, J. This was an action on the case, brought by appellee, in the Kane circuit court, against appellants, to recover for injuries received by falling from a car, and having his legs so badly injured or crushed, by the engine passing over them, that they had to be amputated.

It appears that on Monday morning, the 18th day of November, 1867, appellee, who was employed by the company as a brakeman, while engaged in the discharge of his duty, and being on the end of a freight car, holding to an iron rod, in obeying an order from his superior, in attempting to descend from the car for the purpose of uncoupling it from the engine, swung himself around so as to descend by a ladder on the side of the car, but owing to the fact that it was out of repair, lacking two rounds, that were missing, he failed to get a hold for his feet, and the weight of his body broke his hold of the iron rod, when he fell to the ground, and the engine, which was backing at the time, passed over his legs and crushed and injured them so that amputation became necessary.

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The jury found a verdict in his favor, and assessed the damages at \$18,000. A motion for a new trial was entered by defendants, but was overruled by the court, and judgment rendered on the verdict. An appeal was perfected, and the case is brought to this court and errors are assigned on the record. They question the correctness of the decision of the court in giving instructions for plaintiff, and in the refusal to give others for the defendants, the admission of evidence, and in overruling the motion for a new trial.

It is first insisted that there was a variance between the declarations and the proof; that in the declaration it is averred that the injury occurred while appellee was acting as a brakeman on a freight train of appellants, while the proof shows that he was acting as a brakeman in switching cars at the station, in making up a freight train. There is no dispute, but the three or four cars being switched were freight cars, and were being propelled by an engine, and were what is generally understood to be a freight train. It was a train of freight cars, and, therefore, a freight train. It was a train used for the transportation of freight, as contradistinguished from a train composed of cars usually employed in transporting passengers, and called a passenger train. In this we perceive no variance, and the evidence was properly admitted for the consideration of the jury.

It is next urged that appellee was guilty of negligence in not seeing and knowing the ladder was defective, and in attempting to descend, in not placing his feet upon the two lower rounds of the ladder.

This was a question fairly falling within the province of a jury to determine. But when it is remembered that he occupied a subordinate, although a highly responsible place, requiring vigilance, with prompt action, it is not to be expected or required that he should act with that deliberation and circumspection as persons having more time and less pressed to prompt action in the performance of their duty. In the discharge of his duties on a switch he must keep a constant watch for the signal from his superior, which, to him, is a peremptory order, requiring instant obedience. This being so, we could not expect him to deliberately examine a ladder to see whether it was in repair. He, no doubt, seated himself so as to be in position, when ordered, to swing himself around on the ladder and descend in the shortest space of time possible, to uncouple the train from the engine, and, keeping a constant look for the signal, he probably did not see the ladder, but knowing that it was there, felt

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sure that he could use it in the discharge of his duty, and hence did not observe the defect.

It is again urged that it was the duty of appellee to see and know the condition of these steps, and the case of the *Illinois Central R. Co. v. Jewell*, 46 Ill. 99, is referred to in support of the position.

It is there said the condition of the brake is under the special care of the brakeman, and that it is his business to see that it is in a fit condition for use, and to report defects to the company. While this is true, it is with the qualification that the brakeman knew, or could by reasonable precaution know, of the defect. If the defect is inherent from improper material, or from unskillful workmanship, and the defect had not been developed, he should not be held to have known the fact, and to report to the proper department. As to these steps there was no direct evidence whether appellee previously knew or could have known of this defect. If this car had been used by the road while he was a brakeman on the train of which it was a part, then he would be presumed to have known of its condition, and required to govern his conduct in reference thereto. This was a matter of inference from the evidence in the case, to be determined by the jury, from all the circumstances in proof.

It is held to be the duty of these companies to furnish to their employees safe materials and structures. Such an obligation is permanent and cannot be avoided by them by delegating the power to others, and the understanding with their servants is direct, that they will furnish suitable and safe materials and structures. *Chicago and Northwestern R. R. Co. v. Sweet*, 45 Ill. 197.

This car was placed upon the road by some one superior to appellee in authority, and he was acting under such authority. The jury might reasonably infer that those placing it on the road knew its condition. He had no choice but to obey orders, and was compelled by those above him in authority to ascend the car and again descend and uncouple the car from the engine when required. He was not, and could not be, responsible for the defect. Nor should he be held liable for the defective car, as he neither furnished it nor placed it upon the track. Nor should he be responsible for the acts of those who did, as fellow servants, as the fault was not that of such a servant engaged in the same department of the common business. It was the act of a superior, in another department.

It was held in the case of the *Chicago and Northwestern R. R. Co. v. Sweet*, *supra*, that, although a railroad company may construct

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their road and furnish its machinery through its servants, yet other employees, in different departments are not to be prejudiced by the negligence of such servants.

Again, in the case of the *Illinois Central R. R. Co. v. Jewell, supra*, it was held that where the company had employed a reckless and incompetent engine driver, and his character was known to them, and he was still retained, the company was liable for the death of a brakeman killed by the recklessness or improper conduct of such driver. Hence, in this case, appellee should not be prejudiced by the negligence of those having charge of the inspection and repair of their cars, as they were superior to him in authority, and their notice of the defect was notice to the company, as they can only receive notice through the proper officers of the road.

We have carefully examined the instructions of appellants, which were refused, and find that all of them embodying principles applicable to the case were substantially given in their other instructions. We can perceive no objection to those given for the appellee. The instructions given for appellants were all and were more than they had a right to have given. The jury seem to have been warranted in finding the issues for appellee.

We now come to the consideration of the question of damages. \$18,000 is so large a sum that we regard it excessive. That amount put at interest, at the highest legal rate, would produce, annually, \$1,800 — more, by a large sum, than is obtained by the most skillful mechanics for their labor, while appellee, in pursuit of his calling as a brakeman, could probably not have received more than one-third of that sum. It is true that appellee has received a grievous injury, and has been rendered almost unfitted for business, but the railroad company should not be required to render to him a sum which would produce a greater income than he could have earned had he not been injured. He is only entitled to compensation, and not to vindictive damages, as corporations are not liable to more than compensatory damages, unless the injury is wanton or willful, and that is not the case in this record. But we can see that, after deducting physicians' bills, loss of time and other expenses, including counsel fees, the sum left would, at interest, produce an annual sum largely above any amount he could have expected to earn had he not been disabled.

This verdict seems to have been the result of passion or prejudice, and not of calm and dispassionate reflection. The finding must be

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in proportion to the injury sustained, and when it is greatly excessive, as it is in this case, it will be set aside. The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

KURTZ, appellants, v. HIBNER.

(55 Ill. 514.)

Will—misdescription in. Parol evidence. Real estate—parol promise to convey.

By a will, land in "section thirty-two" was devised to E., and land in "section thirty-one" was devised to J. *Held*, that parol evidence was inadmissible to show that the draughtsman of the will made a mistake, or that "section thirty-two" should be section thirty-three, and "section thirty-one" should be section thirty-two. (*See note, p. 669.*)

A parent made a parol promise to convey land to his child, whereupon the child took possession and made extensive and valuable improvements. *Held*, after the death of the parent, that specific performance could be enforced.

BILL in chancery. John Hibner and others, children and heirs at law of John Hibner, deceased, filed their bill for partition, in the circuit court of Will county, against appellants, Charles, Elizabeth and James Kurtz.

The bill alleges that, by the death of the deceased, complainants and defendants, except James, became seized in fee, as tenants in common, of the west half of the south-west quarter of section 33, town 35, range 10 east, eighty acres, and the south half of the east half of the south-east quarter of section 32, town 35, range 10 east, forty acres; that Elizabeth was entitled to the undivided one-sixth part of the lands; that James claimed title to the forty-acre tract; and that Elizabeth is a daughter of the deceased and the wife of Charles. The bill is in the usual form.

Appellants answered, admitting the allegations of the bill, except as to the intestacy of Hibner, and averred that he devised the eighty-acre tract to Elizabeth, and the forty acres to James; that there was a misdescription of the lands in the will, and that Charles and

Elizabeth had been in possession of, and made valuable improvements upon, the eighty-acre tract, upon the promise of the deceased that he would give the same to Elizabeth.

The usual replication was filed, cause heard, and decree rendered for partition. To reverse this decree appellants have brought the case to this court.

D. H. Pinney, for appellants.

W. C. Goolins, for appellees.

THORNTON, J. (after stating the facts). The circuit court refused to hear parol evidence, to explain the language of the will. The only provisions of the will to be considered are the following:

"*Third*. I give and bequeath to my daughter, Elizabeth Kurtz, all that tract or parcel of land situate in the town of Joliet, Will county, Illinois, and described as follows: The west half of the south-west quarter of section 32, township 35, range 10, containing eighty acres, more or less, together with all the appurtenances thereunto belonging, or in anywise appertaining.

"*Seventh*. I give and bequeath to my grandson, James Kurtz, all that part or parcel of land described as the south half of the east half of the south quarter, section 31, in township 35, range 10, containing forty acres, more or less."

Appellants offered to prove that the testator, at the time of his death, owned only one eighty-acre tract, in township 35, which was the one described in the bill; that a mistake was made in drafting the will, by the insertion of the words "section thirty-two," instead of "section thirty-three;" that Charles and Elizabeth Kurtz had been in the actual possession of the tract for a number of years, and upon the repeated promise of the testator in his lifetime, that he would give the same to Elizabeth, had made lasting and valuable improvements, at their own expense, on the land; had fenced it, and erected thereon a dwelling-house, barn and corn cribs, dug wells and set out fruit trees.

Appellants also offered to prove that James Kurtz, at the time of the death of the testator, was in the actual possession of the forty-acre tract, as the tenant of the deceased, and that the draughtsman of the will, by mistake, inserted the word "one," after the words "section thirty," instead of "two," so as to bequeath to James land

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in section thirty-one instead of section thirty-two. This evidence was rejected by the court on the hearing.

It has been strongly urged by counsel for appellants, that this evidence should have been received for the purpose of ascertaining the intention of the testator. The will devises land to Elizabeth in section thirty-two; the parol evidence offered was for the purpose of locating the land in section thirty-three. The will devised to James "the south half of the east half of the south quarter of section thirty-one." It was proposed to show by parol evidence that the testator intended to devise to James "the south half of the east half of the south-east quarter of section thirty-two."

The law requires that all wills of lands shall be in writing, and extrinsic evidence is never admissible, to alter, detract from, or add to, the terms of a will. To permit evidence, the effect of which would be to take from a will plain and unambiguous language, and insert other language in lieu thereof, would violate the foregoing well-established rule. For the purpose of determining the object of a testator's bounty, or the subject of disposition, parol evidence may be received, to enable the court to identify the person or thing intended. In this regard, the evidence offered afforded no aid to the court. The devise is certain, both as to the object and subject. There are no two objects, no two subjects.

The intention of the testator must prevail. How shall this be ascertained? In the case of *Smith v. Bell*, 6 Pet. 74, Chief Justice MARSHALL says: "The first and great rule in the exposition of wills, to which all rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. This principle is asserted in the construction of every testamentary disposition. It is emphatically the will of the person who makes it, and is defined to be 'the legal declaration of a man's intentions, which he wills to be performed after his death.' These intentions are to be collected from his words, and ought to be carried into effect, if they be consistent with law."

The thing devised is certain and specific. Section, township and range are given. The evidence offered, as to the mistake in the section, would have made a new and different will. The testator devises lands in certain sections. The description is full, certain and explicit. No doubt arises upon the reading of the will. Every mind is forced to the same conclusion, that the land devised, the subject of disposition, is clearly, and without the slightest ambiguity

described. The language is not applicable to any other land. No extrinsic evidence, then, is needed, to identify the thing intended. The intention is manifest from the words of the will.

The case of *Tucker et al. v. Seamen's Aid Society*, 7 Metc. 188, is cited by appellants' counsel. It appeared in that case that, in consequence of incorrect information, the legatee was not, probably, the object of the testator's bounty. Other societies claimed the legacy. The court, however, decided that the legacy should be paid to the "society" designated in the will; not upon extrinsic proof, but upon the words of the will.

The case of *Riggs v. Myers*, 20 Mo. 239, is also cited by counsel for appellants. That case is very different from the one under consideration. The testator, in that case, made a full disposition of all his estate, and then described certain lands, locating them in a township in which he owned no lands. The land intended to be devised was, however, identified by reference to "the big spring" upon it. In the case before the court there is no disposition, either specifically or generally, of the lands in the bill mentioned.

We think, therefore, there was no error in refusing the admission of extrinsic evidence, to detract from, or add to, the terms of the will. The law requires a will to be in writing, to be executed in the presence of two witnesses, and with certain solemnities, to insure its correctness and protect the testator from mistake and imposition.

There is no ambiguity in this case, as is urged. When we look at the will it is all plain and clear. It is only the proof, *aliunde*, which creates any doubt, and such proof we hold to be inadmissible. *Doe v. Hiscocks*, 5 Mees. & Welsb. 363; *Miller v. Travers*, 8 Bing. 244; *Jackson v. Sill*, 11 Johns. 212; *Jackson v. Wilkinson*, 17 id. 146; *Mann v. Mann*, 1 Johns. Ch. 231.

The decree in this case must, however, be reversed, for the refusal of the court to admit the evidence offered, as affecting the rights and interests of the parties in making the partition. By the decree, the court found that Elizabeth Kurtz was entitled to the undivided one-sixth part of the lands, without any directions to the commissioners to assign to her the portion improved; and, in case partition could not be made, to allow her a reasonable remuneration from her co-tenants, who received the benefit of the improvements. This was error. *Louvale et al. v. Menard et al.*, 1 Gilm. 39; *Dean et al. v. O'Meara et al.*, 47 Ill. 121; *Borah v. Archer*, 7 Dana, 176.

It would be inequitable to permit the complainants to share in the

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benefits of the improvements, without making some compensation to the defendants for the necessary increased value of the land, occasioned by the improvements.

As to the eighty-acre tract, we think, from the evidence offered, that Elizabeth Kurtz is entitled to specific performance of the parol promise repeatedly made by her father. Appellants offered to prove such parol promise, by the testator in his life-time, to Elizabeth, and that, in consequence of such promise, possession was taken and extensive and valuable improvements made by them. A court of equity will always enforce a promise upon which reliance is placed, and which induces the expenditure of labor and money in the improvement of land. Such a promise rests upon a valuable consideration. The promisee acts upon the faith of the promise. We can perceive no important distinction between such a promise and a sale. Courts would sanction wrong and fraud not to sustain such a promise. If the proof offered can be made, then Elizabeth is entitled to specific performance, and a decree for the conveyance of the eighty acres to her, upon the filing of the proper bill. *Bright et al. v. Bright*, 41 Ill. 97; *Shepherd v. Bevin*, 9 Gill, 32; *King's Heirs v. Thompson*, 9 Pet. 204.

We do not think that James Kurtz has any title to the forty acres, by virtue of the will or otherwise, and partition should be made of it.

The decree of the circuit court is reversed, and the cause remanded, with instructions to that court to proceed in accordance with this opinion, and with leave to Elizabeth to file her cross-bill.

Decree reversed.

NOTE.—The above decision seems to be in direct contravention to the current of authorities. One of the earliest and most celebrated cases is *Selwood v. Muddmay*, 3 Ves. Jr. 306. The testator bequeathed “ $\frac{24}{100}$ per cent stock,” whereas, several years before he made this will, he had sold out that stock, and purchased long annuities with the produce. The draftsman was allowed to testify that the testator gave him, as a part of his instructions, a former will, containing similar provisions, without informing him of the change in the form of the securities, and consequently the mistake arose. It also appeared that testator had no other stock. The bequest was held to carry the long annuities.

In *Doe d. Le Chevalier v. Huthwaite*, 3 B. & Ald. 632, the testator devised to Stokeham Huthwaite, second son of John Huthwaite, for life, with remainder to his first and other sons and daughters, in strict settlement; and in default of such issue, to John Huthwaite, third son of the above-mentioned John Huthwaite, for life, etc. In fact, Stokeham was the third son of John Huthwaite, and John, the devisee, was his second son. The court admitted evidence of the state of the testator's family and other circumstances, and left it to the jury to determine whether a mistake was made. Wigram thinks that the doctrine *falsa*, etc., cannot apply to this case, but we cannot see why not. By dropping the words “second” and “third,” a perfect description is

left, and it was, undoubtedly, in the order of birth, rather than in the christened names, that the testator made his mistake. But leaving it as a question of fact was the correct ruling.

In *Mosley v. Massey*, 9 East, 149, the testator had an estate in the county of Monmouth, of which he was seized in fee in possession. He had another estate in the county of Radnor, of which he was seized in fee, subject to the uses of his marriage settlement, by which he had covenanted to convey to the use of himself and wife for life; remainder to his first and other sons in tail. By his will, misreciting his estate in fee in possession to be in Radnor, and his disposable reversion in the other fee to be in Monmouth, he devised his estate so misdescribed as being in Radnor to his wife for life, remainders to his sons and daughters; and devised his estate so misdescribed as being in Monmouth, after the death of his wife and only son, without issue, to his daughter, etc. The will described the estate so misdescribed as being in Monmouth, as formerly belonging to his uncle, and the testator had no other estate in either county. The court of king's bench—the case being sent for their opinion by the lord chancellor—held, Lord ELLENBOROUGH presiding, that enough appeared, independent of the local description, to enable them to effectuate the deviser's plain intent.

In *Thomas v. Thomas*, 8 Term R. 671, the devise was "to my granddaughter, Mary Thomas, of Lleobillyd, in Merthyr parish," etc. The testator had a granddaughter, Ellnor Evans, residing at that place, and a great granddaughter, Mary Thomas, residing at Green, parish of Llangam, some miles distant. Parol evidence was admitted to show that, when the will was read over to the deviser, he said there was a mistake in the name of the devisee, but there was no need of altering it, because the place of abode sufficiently indicated what he meant. This was supported by Lord KENYON.

In *Hodgson v. Hodgson*, 2 Vern. 503, land was devised, charged with payment of "£100 he owed to one Shaw." It turned out that the money was not due to Shaw, but to Alice Beck, wife of one Fitch. The devisee refusing to pay the money, the lord chancellor allowed the draftsman to testify that the testator declared that he meant the £100 due to the person who married Mr. Beck, of Lincoln, and another witness deposed that he said he meant the debt for which C. was bound as surety.

Beaumont v. Fell, is a very celebrated case (2 P. Wms. 140). Testator gave a legacy to Catharine Earnley. There was no one of that name, but Gertrude Yardley claimed the legacy. It appeared that when he made his will the testator's voice was very low; that he usually called the legatee "Gatty;" that the scrivener not fully understanding whom he meant, was referred by testator to J. S. and wife for information, who afterward declared that Gertrude Yardley was intended. The court laid stress on the resemblance in sound between "Gatty" and "Katy," and the legacy was given to Gertrude Yardley.

A very strong case is *Morgan v. Morgan*, 1 Crompt. & M. 235. A testator devised certain property to his nephew Morgan Morgan, and other property to his nephew Morgan Morgan of the village of Mothvey. He had two nephews of this name, one of whom lived at Mothvey, and the other elsewhere. It was contended, that it was to be presumed that the testator, in making the distinction apparent in this description, and different persons in his contemplation, and that, this being apparent on the face of the will, parol evidence to the contrary was inadmissible; but the court held that evidence was admissible of the testator's oral declarations made at the execution of the will.

In the case of *Miller v. Travers*, 8 Bing. 244, cited and relied on by Judge THORNTON, the testator devised all his freehold and real estates whatsoever, situate in the county of Limerick and in the city of Limerick. He had real estate in the city of Limerick, and in the county of Clare, but none in the county of Limerick. The vice-chancellor admitted evidence to show that the testator intended to devise his estate in Clare, and that the word "Limerick" was inserted by mistake. On appeal, this was reversed. WIGRAM says, at paragraph 177, that the question raised was whether evidence to prove intention, as distinguished from explanatory evidence, was admissible. The gist of the decision is contained in these words: "There are no words in the will which contain an imperfect, or, indeed, any description whatever of the estates in

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Clare. The present case is rather one in which the plaintiff does not endeavor to apply the description contained in the will to the estates in Clare, but, in order to make out such intention, is compelled to introduce new words and a new description into the body of the will itself." The doctrine *falsa*, etc., is explicitly recognized. *Selwood v. Muddmay*, 3 Ves. Jr. 306, is approved, on the ground that it was a bequest of stock, and the descriptive words might be rejected. The case of *Goodtitle v. Southern*, 1 M. & S. 206, was also approved, in which the devise was of "all that my farm, called Trogue's farm, now in the occupation of A.C." The farm turned out to be in other occupation, but the devise was held effectual. So of *Day v. Trigg*, 1 P. Wms. 236, where the devise was of "all the testator's freehold houses in Aldersgate street," when, in fact, he had only leasehold houses there. The court say a part of the description which is inaccurate may be rejected, where there is a sufficient description to ascertain the thing devised, but nothing can be added.

In *Doe d. Oxenden v. Chichester*, 3 Taunt. 147, parol evidence was held inadmissible to show that in a devise of "my estate of Ashton," the testator intended to include lands in adjoining parishes which he had been used to call his Ashton estate.

In *Newburgh v. Newburgh*, 1 M. & Sc. 352, it was held, that parol evidence was inadmissible to show that in a devise of lands in *Sussex* the testator intended to embrace lands in *Gloucester*, which latter word was omitted by mistake.

In *Hiscocks v. Hiscocks*, 5 M. & W. 263, there was a devise to testator's son John for life; from his decease to testator's grandson, John H., eldest son of the said John H., for life, with remainders over. At the time of the making of the will, testator's son John H., had been twice married. By his first wife he had one son Simon, by his second an eldest son John and younger sons and daughters. Simon and John both claimed the lands. The question was, whether evidence of the testator's intention, consisting of instructions given for his will, and declarations made by him after his will, were admissible. The evidence was held inadmissible, but the court say: "If, therefore, by looking at the surrounding facts, to be found by the jury, the court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that for this purpose they cannot receive declarations of the testator of what he intended to do in making his will."

In *Lindgren v. Lindgren*, 9 Beav. 358, testatrix bequeathed "£500 of the stock & per cent consols now standing in my name in the books of the Bank of England." She also bequeathed £100 "of said 3 per cent consols" to each of five other persons, and there was a residuary clause. She had no stock whatever at the time of making the will nor afterward, but it appeared that three years before she had possessed £1,000 of that stock, which she had sold out, and the proceeds she had lent to plaintiff, who, by agreement, paid her therefor the interest which she had realized from the stock. The bequest was held to carry the money. The case was decided on the authority of *Selwood v. Muddmay*, which was held not to be overruled by *Müller v. Travers* or *Hiscocks v. Hiscocks*.

But the most important English case, and the most recent case that has come to our notice, is *Grant v. Grant*. The devise was "to my nephew, Joseph Grant," and the testator appointed "my said nephew, Joseph Grant," his executor. The testator had a nephew Joseph Grant, son of his brother William, but he did not know of this nephew's name or existence, nor was he on friendly terms with this brother. The testator's wife also had a nephew of the same name, who had been brought up by the testator from the age of ten years, and had for fifteen years resided in his family, and assisted him in the management of his business. The testator was in the habit of calling this latter person "his nephew," and had frequently declared his intention of making him his heir, and of cutting off his brother's family. The case first came before the courts on an application for letters testamentary in 1869, and Lord PENZANCE admitted evidence of all the foregoing facts, and granted letters to the wife's nephew (39 L. J. R., N. S., 17). He says: "It is said that the court is bound by the primary signification of words used in a will, and that nothing but the primary signification in its strictest sense can be resorted to, unless that signification would produce some absurdity or render the meaning insensible. A proposition of this kind is, no doubt,

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to be found in Sir James Wigram's book; but a great deal turns upon the question, what is meant by the expression 'primary signification?' It will not do to carry it too far. When a man makes his will, it is fair to presume that he uses ordinary language in its ordinary sense, and if the original signification of a word is scrupulously followed in all cases, to the exclusion of that which, by the common consent and use of mankind, it has in process of time acquired, the court would be carried, in some cases, a long way from the testator's intention in the endeavor strictly to follow it." He cites the admission of proof of custom in certain localities to affix particular meanings to certain words in the construction of contracts, and claims that the like proof should apply in cases of wills and of the custom of individual testators. He admits that the word "nephew," when used in a will to describe a class of beneficiaries, includes only the sons of brothers or sisters of the testator; "but this," he says, "does not appear to me to preclude a wider signification being attached to the word when used as an additional description of a person specified by name, to whom the word is in an ordinary and popular sense applicable."

The case next came up in 1870, in an action of ejectment, in the common pleas, on a case stated, and a construction of the devise was given (39 L. J. R., N. S., 140). The parol evidence was admitted, and the devise held to intend the wife's nephew. Chief Justice BOVILL concedes that there is no ambiguity on the face of the will, but admits the evidence to identify the party intended to be described, "just in the same way as such evidence is admissible to identify and to show what was the subject-matter devised." He inclines to the opinion that the word "nephew" has no definite legal signification, but he is clear that, even if it has the strict signification claimed, still the fact that it was used by the testator to describe the wife's nephew is conclusive. On appeal from this judgment of the common pleas to the exchequer chamber, it was unanimously affirmed, without hearing the respondent's counsel (39 L. J. R., N. S., 272). Chief Baron KILLY thinks that, although, in its strict and original sense, the word "nephew" means a brother's or sister's son, yet, in an ordinary and popular sense, it may mean a wife's sister's son. He declined giving any opinion as to the testator's habit of calling the respondent his nephew, but laid great stress on his relations with the respective claimants. MARTIN, B., and CHANNELL, B., were of the same opinion, and so were MELLOR, J., and CLESBY B. BLACKBURN, J., was of the same opinion, but doubted whether the proof of testator's habit of calling defendant "his nephew" was admissible, and held the evidence of his declarations inadmissible; but in the remainder of the extrinsic evidence he finds ample warrant for his judgment. As he ingeniously puts it: "The testator may be supposed to be talking of his family affairs, and saying: 'I am speaking of my family and family matters; I have adopted, and have living with me, and conducting my business, Joseph Grant, the son of my wife's brother; I have a brother of whose family I know nothing, and of whose children's names and existence I am ignorant, and I leave this property to my nephew, Joseph Grant.'" One can hardly conceive of a case more strongly in point than this, and it has the advantage of meeting Judge THOMPSON's objection, that there is no ambiguity on the face of the Kurtz will.

In short, although there was a person strictly answering the testator's description in every particular, and in every sense of the words used, yet, as there was another person answering the same description, in one sense of the words used, and it was evident, from the circumstances, that the testator intended this latter person, the court held the latter to be the person intended in law.

In *Thomson v. Downer*, 23 Vt. 225, an action of ejectment, the devise was of "a certain right of land which I purchased, lying on the main, supposed to be in Vermont." The court held that a devise is never void for uncertainty, upon the mere ground that the description is indefinite, but only when, after resort to parol proof, the subject still remains mere matter of conjecture.

In *Asylum v. Emmons*, 3 Brad. 144, testatrix bequeathed "her shares of the Mechanics' Bank stock" to the asylum. She had no stock but City Bank stock, and that was held to be carried by the bequest.

In *Allen v. Lyons*, 2 Wash. C. C. 475, the devise was of "his house and lot on Third street, in the occupation of R. H." The deviser owned no house in Third street, but

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owned one in Fourth street which was occupied by R. H. Held, that the devise might be effectuated by dropping entirely the reference to the street.

In *Winkley v. Kotme*, 32 N. H. 268, the devise was of "thirty-six acres more or less of lot thirty-seven, in the second division of Barnstead, being same I purchased of John Peavey." It appeared that there was no such lot in that division, but that testator owned land in lot ninety-seven of that division, exactly answering the rest of the description, and this was held to pass. The number of the lot was held superfluous, the description being sufficient without it.

Riggs v. Myers, 20 Mo. 230, distinguished by Judge THORNTON, the testator described lands as in a township where he really owned none, but the identification was completed by a reference to the "big spring" on them. "The fact that the actual location of the land devised was sufficiently identified by reference to natural objects upon it, is not different in principle from its identification by the remaining portion of the description."

In *Button v. Tract Society*, 23 Vt. 336, the devise to the "American Home Mission Society" was held to operate in favor of the American Tract Society, there being no such devisee as the one described. It was shown that the testator had been accustomed to contribute to that Tract Society and also to the American Home Missionary Society, from which it might well be suspected that he intended both, and that the word *and* had been omitted; but as he also constituted "the above named Tract Society" a reversionary legatee, it was inferred that he intended the devise only for that society.

In *re Gregory*, 34 Beav. 600, decided in 1865, seems a case of false description. The bequest was "unto Francis Gregory, the youngest son of my brother Francis Gregory." His brother, Francis Gregory, had three sons, the eldest, Arthur Francis, the youngest, Arthur Charles. On evidence, the master of the rolls made the description prevail over the name. The case is quite analogous to *Chevalier v. Huthwaite*, *ante*.

In *Vernon v. Henry*, 3 Watts, 385, the testator had given a legacy to James Vernon Henry, describing him as his nephew, and son of Elizabeth, a deceased sister of the testator. James Vernon Henry claimed the legacy, as also did Robert R. Henry. It appeared, in evidence, that James was not the nephew, but a grand-nephew, of the testator, and, instead of being the son, he was the grandson, of Elizabeth. Robert, on the other hand, was a nephew of the testator, and the only son of Elizabeth living at the date of the will. Upon the extrinsic evidence produced, James was held entitled.

In *Woods v. Moore*, 4 Sandf. 579, the testatrix devised two lots of land, describing them, which lots she had previously sold and conveyed, taking bonds and mortgages for the unpaid purchase-money, which she held at her death. Held, that the bonds and mortgages passed to the devisee. OAKLEY, C. J., says: "The rule established is very plain, that where it is clear that there was an intent that the property in question should pass, it will be held to pass, notwithstanding a misdescription, so long as there is enough of correspondence to afford the means of identifying the subject of the gift."

From these cases, and from Wigram's 5th, 6th and 7th propositions, we deduce the following rules:

1. For the purpose of ascertaining the beneficiary, identifying the thing bestowed, or determining the quantity of interest given, in a will, the court may inquire into every material fact relating to the claimant, the property claimed, and the circumstances and affairs of the testator and his family, and the claimant; and the testator's declarations contemporaneous with the making of the will, but no other, are admissible in this view; but no evidence of mere mistake on the part of the testator or the draftsman is admissible.

2. A description partly false may be made operative by rejecting the false part, providing the remaining portion reasonably corresponds with the person thing or interest indicated by such extrinsic evidence; but no words can be added to any description. — RHP.

LAWRENCE, appellant, v. HAGERMAN.

(50 ILL. 68.)

Malicious prosecution — consequential damages.

An action for maliciously suing out a writ of attachment will lie notwithstanding a bond given in the attachment suit, conditioned to pay all damages arising from the attachment; and in such an action the plaintiff is entitled to recover the consequential damages of the attachment to his business, credit and reputation, together with the counsel fees and expenses incident to the defense of the attachment suit.

ACTION on the case for maliciously, and without probable cause, suing out a writ of attachment, whereby plaintiff's business, credit and reputation, etc., were injured. The opinion sufficiently states the case. Judgment for plaintiff for \$2,000. Defendant appealed.

M. F. Tuley, J. N. Barker, William Hopkins and T. J. Tuley, for appellant.

Spafford, McDaid & Wilson, for appellee.

SCOTT, J. The questions presented by this record, upon which appellant relies to reverse the judgment, arise mainly upon the errors assigned which question the rulings of the court in the admission and rejection of evidence, and in the giving and refusing of instructions. Upon the errors assigned the appellant makes three other distinct points. First, that the rule for ascertaining the measure of damages was incorrectly stated; second, that the verdict is wholly unsupported by the evidence, and is excessive; and third, that the action will not lie.

The objections to the admission of evidence are too numerous to be noticed in detail, but they may all be grouped under one general objection, viz.: That the evidence to show the extent of the injury by the wrongful act complained of, to the business, credit and reputation of the appellee, was inadmissible under the averments of the declaration. There are some minor objections to the form of the questions propounded to the witnesses, and the order in which the testimony was presented, which we do not deem material to be considered.

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The general objection to the instructions given for the appellee raise the same question as that taken to the admission of improper evidence, and they may properly be considered together.

The action is founded in tort, for maliciously suing out the process of a court. The averment in the declaration is, that the appellant "wrongfully, unjustly and maliciously, and without probable cause therefor," sued out a writ of attachment under the attachment act, and with a malicious and wrongful purpose caused the same to be levied on the goods and chattels of the appellee. It is alleged that, by reason of the premises, the appellee sustained special damage in the depreciation of the value of the property levied on, and in the expenditure of large sums of money in the defense of the action, and, as general damage, that his business was broken up, his credit and reputation impaired and destroyed.

The testimony offered to which objections were interposed tended to show, negatively at least, that there was no probable cause for suing out the writ. This was a material averment, and it was necessary to be proven. The evidence offered for that purpose was legitimate and proper.

The main objection taken is to the evidence offered to establish the measure of damages. It seems to us that the averments in the declaration are broad and comprehensive enough to admit of evidence of all the injuries sustained in consequence of the wrongful act alleged. For the purpose of estimating the extent and magnitude of the injury, the court permitted the appellee to introduce evidence of the nature, character and amount of business transacted at and before the date of the wrongful levy, and also evidence of the complete destruction of that business, and of the extent to which the credit and financial reputation of the appellee were impaired, and also evidence of the actual loss of the stock levied on, and of the expenses incurred in and about the defense of the suit. No reason is perceived why these facts do not constitute proper elements for the consideration of a jury in estimating the damages occasioned by the tortious act of the appellant. The evidence was pertinent to the issue made by the pleadings, and the issue stated was broad enough to admit the proof.

In actions on the case, the party injured may recover from the guilty party for all the direct and actual damages of the wrongful act, and the consequential damages flowing therefrom. The injured

party is entitled to recover the actual damages, and such as are the direct and natural consequence of the tortious act.

In this instance the amount of money actually paid out in and about the defense of the suit, and the depreciation of the value of the stock on which the wrongful levy is alleged to have been made, are not the only damages sustained, if the appellant wrongfully, unjustly and maliciously, and without probable cause, sued out the writ of attachment and caused the same to be levied in the manner charged. The business of the appellee had hitherto been prosperous, his credit and financial reputation good, and all were destroyed by the malicious acts of the appellant, if it be conceded that he was guilty as alleged. It cannot be said that the law will afford no redress for the destruction of financial credit and reputation, or mete out no measure of punishment to the guilty party who wantonly and maliciously destroys them. The reputation and credit of a man in business is of great value, and is as much within the protection of the law as property or other valuable rights. And if it be true that the appellant has maliciously, by his wrongful act, destroyed the business, credit and reputation of the appellee, the law will require him to make good the loss sustained. *Chapman v. Kirby*, 49 Ill. 211.

The instructions given for the appellee announce these principles with sufficient accuracy. The jury were correctly told that in estimating the damages they might take into consideration any injury shown by the evidence that the appellee sustained in his business and reputation, together with the losses actually sustained by the wrongful suing out of the writ of attachment. The jury were also instructed that they were not confined to the actual damages, if the wrongful acts were wantonly and maliciously committed, but they might give exemplary damages. Such is the well-established rule of the law.

It is objected that the jury were not told in the instructions given for the appellee that he could not recover for his taxable costs in the former suit, in this form of action.

The rule is, that the instructions given for the plaintiff and the defendant must be construed together, and when so considered, if they state the law correctly, as a whole, the error that may appear in one series will be deemed corrected by the other. In this instance the jury were distinctly told, in an instruction given on behalf of the appellant, that the appellee could not recover his taxable costs

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in the attachment suit, in this form of action, and this instruction must be held to have modified the appellee's instruction to that extent.

The principle of awarding damages seems to be the same whether the prosecution is by indictment or by civil proceedings, and if the prosecution in either case is malicious and without probable cause, the jury are not confined to the actual damages proved in estimating the damages, but they may, in the exercise of a sound discretion, give exemplary damages, and although the party may not recover taxable costs, if he has judgment for the same, yet he may recover counsel fees and other expenses incident to the defense of the suit. 2 Greenl. Ev., § 456.

The instructions considered together state the true rule for ascertaining the measure of damages, and no error that would mislead the jury on the facts involved appears, and they must therefore be held to be substantially correct.

It is insisted that an action on the case for maliciously suing out a writ of attachment cannot be maintained. The objection proceeds on the ground that, inasmuch as the statute requires the plaintiff in attachment to give bond, with security, conditioned to pay all damages in case the writ is wrongfully issued, before obtaining the process, the remedy is confined to an action on the bond. We think the objection taken is not tenable, certainly not to the extent insisted upon by the counsel. The remedies by an action on the case and upon the bond may be concurrent to a certain extent. Actual damages, such as direct loss on the property attached, expenses incurred in defense of the suit, may be recovered in an action on the bond. But for loss of credit, breaking up of business, loss of customers and injury to reputation, resort must be had, to obtain full indemnity, to an action on the case for malicious prosecution, under the common law.

In *Bump v. Wight*, 14 Ill. 301, it was held that such an action could be maintained for wrongfully suing out a writ of *ne exeat*, notwithstanding the party suing out the writ was required to give bond before instituting the proceeding.

Mr. DRAKE, in his work on attachments (§ 754), says: "It has been uniformly held in this country that an attachment plaintiff may be subjected to damages for attaching the defendant's property maliciously and without probable cause. The defendant's remedy in this respect is not at all interfered with by the plaintiff having,

at the institution of the suit, given bond with security to pay all damages the defendant may sustain by reason of the attachment having been wrongfully sued out."

We have examined the cases referred to in support of the text, and find the doctrine fully sustained. *Sanders v. Hughes*, 2 Brevard, 495; *Bonnell v. Jones*, 13 Ala. 490; *Smith v. Story*, 4 Humph. 169; *Pettit v. Mercer*, 8 B. Mon. 51; *Senecal v. Smith*, 9 Rob. 418.

The case of *Chapman v. Pickersgill*, 2 Wils. 145, was an action brought for falsely and maliciously suing out a commission of bankruptcy. An objection, like the one taken in this case, was urged, that the action would not lie, there being a remedy given by the statute. It was held that the action was maintainable at common law, independent of the statute, which provided a remedy. There is great force in the reasoning of the lord chief justice who delivered the opinion of the court, where he said: "This is an action for a tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief, and this of suing out a commission of bankruptcy, falsely and maliciously, is of the most injurious consequences in a trading community." This brief paragraph embodies the true philosophy of the law. The law has wisely provided a remedy, ample in its scope, for all the consequences that may naturally flow from every wrongful act.

In this instance the grounds of the action are, that the writ was falsely and maliciously, and without probable cause, sued out, and by reason of the premises the appellee's business was broken up, and his credit and financial reputation impaired. The remedy by action on the bond would not afford complete indemnity, and would not extend to the consequential damages sustained, and hence resort must be had to the common-law action on the case for malicious prosecution. If such an action cannot be maintained, it necessarily follows that there are injuries flowing from wanton and malicious acts, for which the law would afford no redress. Our remedial laws will bear no such narrow and illiberal construction. For every injury to property, credit or reputation, the law has provided an appropriate remedy.

In *Gorton v. Brown*, 27 Ill. 499, it was said by this court that the action will lie, for it is reasonable that, when an injury is done to a person, either in reputation, property, credit, or in his profession or trade, he ought to have an action of some kind to repair himself.

We perceive no reason for making a distinction in cases of mali-

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cious prosecution instituted on criminal charges or in civil actions. The consequences may be ruinous in either case. A man's business, credit and reputation may be as effectually destroyed by a malicious prosecution in a civil action as upon a criminal charge.

We entertain no doubt, upon principle and upon authority, that an action on the case for maliciously, and without probable cause, suing out a writ of attachment is maintainable for the injury of the business, credit and reputation of the defendant, notwithstanding the statute has required the plaintiff to give a bond, conditioned to pay all damages that may be occasioned by the wrongful suing out of the writ. It is a more complete remedy of which a party may avail, independent of the statutory remedy. *Chapman v. Pickersgill*, 2 Wils. 145; *Fortman v. Rottier*, 8 Ohio, 548; *Bump v. Betts*, 19 Wend. 421. .

It is insisted that the verdict is not only unsupported, but that it is against the weight of the evidence, and that it is excessive and oppressive in its amount.

We have carefully considered the evidence, and find that there is testimony from which the jury could properly find that the writ was sued out and the levy made without any probable cause, and that there were no grounds whatever that would justify the appellant in resorting to such violent measures to enforce the collection of his debt. The evidence negatives the inference that the appellant, as a reasonable man, could have entertained the belief that the appellee was about to leave the State, with a view to remove his property, or that he was about to incumber or dispose of his property, with a view to hinder or delay his creditors in the collection of their just debts. We must, in all such cases, rely largely upon the verdict of the jury, as presenting the truth. It was a question of fact, submitted to the jury for their determination, and we cannot say that their conclusion is not warranted by the evidence. It has been repeatedly held, by this court, that where the jury have passed on the questions of fact involved, under proper directions from the court, their finding will not be disturbed in the appellate court, unless it is clearly against the weight of the evidence.

We cannot regard the verdict as being excessive, in view of all the consequences that followed from the suing out of the writ, if it was, in fact, malicious and without probable cause, as the jury have found. The loss on the stock, and the money actually paid out in the defense of the suit in the circuit and supreme courts, amounted,

according to the version of the appellee's testimony, to between \$700 and \$1,000. The evidence is uncontradicted, that, at and before the date of the levy under the attachment writ, the appellee was doing a prosperous business, with a good and advantageous credit. His business was utterly broken up, and his credit impaired, by the ill-advised and inconsiderate act of the appellant. The act of the appellant was hasty and inconsiderate, to say the least of it. There is evidence, if the jury gave full credence to it, from which they could find that he acted with express malice. The law, however, would imply malice from the want of probable cause.

We think that the case was fairly presented to the jury, and their finding cannot be disturbed. Many of the errors complained of in the rejection of evidence were cured in a subsequent part of the trial by the admission of the evidence objected to. • That some slight errors may appear in the record is more than probable; but we are unable to detect any substantial error for which the judgment ought to be reversed.

The instructions, taken and considered together, state the law with sufficient accuracy, and could not have misled the jury on the controverted facts.

We are satisfied that substantial justice has been done, and that, if a new trial should be awarded, and the trivial errors that appear in the record corrected, the result in the end would be the same. It would avail the appellant nothing to award a new trial on the evidence presented in the record. It appears, affirmatively as well as negatively, that there was no probable cause for suing out the writ of attachment, and the consequences to the appellee were most disastrous, and the appellant cannot escape liability for the injuries occasioned by his unwarrantable acts. A verdict that would hold him guiltless, under any view that we have been able to take of the case, could not be permitted to stand. There is but little in the record, under the most favorable view, that palliates the conduct of the appellant.

The judgment must be affirmed.

Judgment affirmed.

Phelps v. Northup.

PHELPS, appellant, v. NORTHUP.

(56 Ill. 155.)

Parol acceptance of order.

Defendants, having a note for collection, received an order from the owner requesting them to pay a portion of the proceeds when collected to plaintiffs. The order having been accepted by parol, defendants subsequently transferred the note to C, to whom it was paid. *Held*, that the parol acceptance was binding, and that defendants were liable to plaintiffs for the amount of the order.

ACTION of assumpsit to recover the amount of an order.

Defendants had a note made by one Struthers belonging to one Rose for collection. Subsequently Rose gave plaintiffs a written order requesting defendants to pay plaintiffs a portion of the proceeds of the Struthers note when collected. It appears that this order was not accepted in writing, but there was evidence that it was accepted by parol. Defendants afterward transferred the note to one Cratty to whom it was paid. The judgment was for plaintiffs. Defendants appealed.

*Johnson & Hopkins and Thomas Cratty, for appellants.**O'Brien & Harmon and H. W. Wells, for appellees.*

MCALLISTER, J. There was sufficient testimony, if believed, to warrant the jury in finding an acceptance, which might be by parol. And there is no such weight or preponderance of evidence the other way as would justify our interference with the verdict. We are to assume, therefore, that the order was accepted. If so, the legal effect was an undertaking on the part of appellants to pay the amount when the note in their possession for collection was collected, and there can be no doubt that, but for their act disabling them from collecting the Struthers note by transferring it, without appellees' consent, to Cratty, it would have been collected by appellants, and then their refusal to pay would have been a breach of their undertaking. If they had the power to disable themselves from collecting the note, in violation of the rights of appellees, and thus get rid

of their contract, the law would aid them in the commission of a fraud. The contract itself imports that they would use due diligence to collect the Struthers note. Allowing the note to be withdrawn from their hands, and delivering it over to another, while appellees' order was in their hands and accepted by them, was a positive breach of duty, and as much a breach of their contract as if they had collected the note, and then refused to pay appellees. *White v. Snell*, 9 Pick. 16.

In *Yeates v. Groves*, 1 Ves. Jr. 280, Lord THURLOW decided that an order to pay a debt out of a particular fund, belonging to the debtor, constituted an equitable assignment of the fund *pro tanto*, and gave the creditor a specific, equitable lien thereon, although the order had not been accepted by the holder of the fund before the debtor's bankruptcy.

In *Israel v. Douglass*, 1 H. Black. 239, Lord LOUGHBOROUGH said, "This debt is, with the consent of the parties, assigned to the plaintiff (the payee); Douglass (the drawee) has notice of it and assents, by which assent he becomes liable to the plaintiffs." *Ex parte Alderson*, 1 Mad. 53; *Lett v. Morris*, 4 Sim. 607; *Weston v. Barker*, 12 Johns. 279; *Taylor v. Bates*, 5 Cow. 376; *Wheeler v. Wheeler*, 9 id. 34; *Bradley v. Root*, 5 Paige, 632.

It follows from these authorities, that the order upon appellants, notice to them, and their assent, bound the fund in their hands. Rose had no right to withdraw, nor they to surrender or assign it over to Cratty. The surrender and transfer of the Struthers note to Cratty was clearly a fraud upon appellees, a breach of appellants' contract, and they were, therefore, liable in this action.

We have examined the instructions given on behalf of appellees, and such on behalf of appellants as were refused, and find no error in either the giving or refusing of instructions.

The judgment of the court below must be affirmed.

Judgment affirmed.

WHEELER, appellant, v. MATHER.

(56 ILL. 241.)

Real estate — rescission of contract of sale — action to recover purchase-money.

A vendor, in consideration of the prompt payment of a sum of money, agreed to sell lands on condition that, in case of the failure of the vendee in the performance of all or either of the covenants on his part, the vendor should have the right to declare the contract void, and take immediate possession of the premises. In the construction of this contract, *held*, that where the vendee enters upon the performance of the contract, and, paying part of the purchase-money, makes default which is inexcusable, and the vendor, being without fault, exercises the right given by the contract of declaring the same terminated, and in doing so acts fairly and within the scope of the power, then no action can be maintained by the vendee to recover back what he has paid; but a vendor who is himself in fault for fraud or violation of his contract, cannot exercise the power so given without making restoration of what he has received under it. In such case the law would imply a promise to repay the purchase-money received, and an action for money had and received would lie.

ACTION of assumpsit. The opinion states the case.

Vallette, Parks & Beaver, for appellant.

H. Snapp, for appellee, cited *Chrisman v. Miller*, 21 Ill. 235; *Moore v. Smith*, 24 id. 515; *Smith v. Lamb*, 26 id. 398; *Gehr v. Hagerman*, id. 441; *Murphy v. Lockwood*, 21 id. 619; *Smith v. Doty*, 24 id. 165; *Jennings v. Gage*, 13 id. 612; *Buchenau v. Horney*, 12 id. 338; *Foster v. Jared*, 12 id. 455; *Trimble v. Reeves*, 25 id. 214; *Anderson v. White*, 27 id. 57; 2 Hill (N. Y.) 293; 5 id. 390; *Bowen v. Schuler*, 41 Ill. 192; *Ryan v. Brant*, 42 id. 84.

MCALLISTER, J. This case is again before the court upon a rehearing, granted at the instance of appellee. It has received an extended and careful reconsideration. But the court finds no reason for varying from the conclusion arrived at in the first instance. In order to a proper appreciation of the additional reasons and authorities given, it is necessary that a re-statement of the case should be given. It is an action of assumpsit, upon the common counts, brought by a pur-

chaser of real estate, to recover back money which he had paid the vendor, and the case was this: The appellee, plaintiff below, was the only witness on his behalf. He introduced in evidence articles of agreement, under seal, bearing date April 1, 1861, whereby appellant, as party of the first part, in consideration of the prompt payment of the money to be paid by appellee, agreed to sell appellee lands therein described, subject to a mortgage, appellee covenanting to pay for them \$1,892, as follows: \$550 cash, at the time of making the contract; \$550 on the first day of June, A. D. 1861, and the balance, \$792, on the first day of April, 1862. Time was made of the essence of the contract. Appellant covenanted that, on the payment of the principal and interest, as specified, he would, without delay, convey all his right, title and interest in the premises, by deed, with full covenants of warranty. The articles contained the proviso that they were upon the express condition that, in case of failure of the party of the second part (appellee) in the performance of all or either of the covenants on his part to be performed, the party of the first part (appellant) should have the right to declare the contract void, and take immediate possession of the premises.

Appellee then produced in evidence a notice, signed by appellant, dated August 2, 1862, and served on him about that time, which, after describing the contract, and reciting appellee's failure in making his payments, notified him that appellant declared the contract void and terminated.

From his own testimony, it appears that appellee had paid only part of the installment of \$550 due June 1, A. D. 1861, and no part of that of \$792, due April 1, 1862. Nor did he offer any excuse for such default, or claim that there was any fraud or default on the part of appellant, but says he never demanded any deed from him. Under this state of facts the court, on behalf of plaintiff below, instructed the jury:

"1. That unless the contract between the plaintiff and defendant, offered in evidence, provides that the plaintiff shall forfeit all that he had paid upon the rescission of said contract; and if they shall further believe, from the evidence, that defendant declared a forfeiture of said contract at his option, under said contract, and that said contract had not been rescinded by the plaintiff, then there was no forfeiture of the amount paid by the plaintiff to the defendant, and plaintiff has a right of action to recover back whatever he paid to defendant on said contract.

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"2. That if the jury believe, from the evidence, that the contract of sale of the land mentioned in the articles of agreement offered in evidence by the plaintiff was rescinded by the defendant, then the plaintiff can recover from the defendant the sum or sums paid upon said land."

These instructions base the right of recovery upon the mere fact of appellant having declared the contract terminated, without reference to any question whether appellee was in fault or appellant without fault; and which, for this reason, were erroneous and must have misled the jury. There is no theory upon which this action can be sustained, if at all, except that of an implied promise.

If appellant had violated the contract, or it had been rescinded by mutual consent, then the law would imply a promise on his part to pay back the consideration received. *Faxon v. Mansfield*, 2 Mass. 147; *Seymour v. Bennet*, 14 id. 266.

But this contract was not rescinded by mutual consent. Appellee violated it, and then, as a consequence, appellant declared it terminated; and it was no breach of the contract on his part to do so. In *Battle v. The Rochester City Bank*, 3 Comst. 88, where the contract contained a similar provision and the right was exercised, the court said: "The rescission of the contract in question by the bank was not a breach of it, but was in pursuance of a provision contained in it; and the defendants are chargeable with no violation of it whatever."

We believe it to be a sound principle, supported alike by reason, authority and good morals, that no man can make his own infraction of his agreement the basis of an implied undertaking in his favor, or of an action for money had and received against the other party who stands fair and innocent. It was upon this principle that the right of recovery was denied in the case of *Ketchum v. Evertson*, 13 Johns. 359, cited in the original opinion in this case. "It would," said the court, "be an alarming doctrine to hold that the plaintiffs might violate the contract, and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have."

In *Green v. Green*, 9 Cow. 47, Chief Justice SAVAGE reviewed all the former cases in New York on the subject, and closes his review by saying: "I forbear the citation of more cases. I have found

none of a recovery, where the party wishing to consider the contract rescinded has not shown a breach of the contract on the other side, or what was equal to it."

The case of *Battle v. The Rochester City Bank*, 5 Barb. 414, involved the precise question in the case at bar. The contract contained the proviso that the vendors might declare it void for default of the vendee in making his payments. Default was made, the right was exercised, and the vendee sued to recover back what he had paid. WELLS, J., who delivered the opinion of the court (and it was afterward affirmed by the court of appeals, 3 Comst. *supra*), said: "In the case at bar it is not pretended that the defendants have not fulfilled to the letter every part of the agreement on their part to be fulfilled, and the plaintiff, by his counsel, in his opening, admits that he neglected to pay the first of the annual installments mentioned in the contract. I confess myself entirely unable to find, in any elementary treatise or reported case, a principle recognized, which would allow the plaintiff to recover."

Stark v. Parker, 2 Pick. 267, is a case where the plaintiff had agreed to work for the defendant a year for \$120; worked part of the time, then quit without any fault on the part of defendant, and sued upon a *quantum meruit* for what he had done. LINCOLN, J., in delivering the opinion of the court, uses this language: "Nothing can be more unreasonable than that a man, who deliberately and wantonly violates an engagement, should be permitted to seek in a court of justice an indemnity from the consequences of his voluntary act, and we are satisfied that the law will not allow it."

Rounds v. Baxter, 4 Greenl. 454, is very similar in its facts to the case of *Ketchum v. Evertson*, *supra*, and the court there said: "The failure in the article of performance, then, was owing to the plaintiff's own fault, negligence or inattention, and we are to decide whether the law, in such circumstances, will furnish him an indemnity against the consequences of this fault, negligence or inattention. It is a proverbial principle that a man is not permitted, in a court of justice, to take advantage of his own wrong or neglect. The principle is founded in the highest reason. The defendant never made an express promise to repay the money in question, and why should the law imply one in favor of a man who has violated his contract on the part of one who stands fair and innocent? If a man gives his neighbor \$100, he cannot by law recover it back; no promise of repayment is implied, and when the

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plaintiff concluded not to perform his contract, but abandon it, we must consider him as waiving all claim to what he had paid, as much as if he had given it without any pretense of consideration received."

In the case of *Hansbrough v. Peck*, in the supreme court of the United States, the contract contained a similar power, and also a clause authorizing the vendor to retain such purchase-money as had been paid. The court, however, does not place the decision upon that ground; because, that being a case in chancery, such a clause, if it operated as mere forfeiture, would receive but little countenance from a court of equity. But recognizing the rule as laid down in *Ketohum v. Evertson*, *supra*, the court said: "And no rule in respect to the contract is better settled than this: That the party who has advanced money or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has been advanced or done." 5 Wall.

The cases of *Smith v. Lamb*, and *Same v. Powell*, 26 Ill. 396, are in perfect harmony with the principles above enunciated. There the vendor was in fault, and the vendees were not. The first three payments had been made and accepted, and, if not made in time, the vendor had made no objection; but, when the time came to make the last payment, he refused to convey, declared his inability to convey a good title for the reason that he had none and never had, and the court said: "Then it appeared that the vendor was not entitled to, and could not receive, the purchase-money, and he had no right to claim a tender of money which he had no right to receive. The purchaser had a right to repudiate the contracts as forfeited by the vendor, or rather, as never having been rightfully executed by him, because he had no right to make them. The plaintiffs had a right to say, you have received our money wrongfully, and even fraudulently, and you must pay it back to us as if you had never made these contracts, which you cannot perform, and which you should never have made."

So of the case of *Gehr v. Hagerman*, 26 Ill. 438. The right of rescission on the part of the vendee was based upon an alleged breach of the contract by the vendor. And so far from recognizing the right of a vendee who had made part performance and then

stopped short and refused to go further, the court said: "The plaintiff, before he could rescind, was bound to restore the property, or at least offer to restore it, to the defendant, *after having performed or offered to perform* his part of the agreement." This is far from recognizing the doctrine that the vendee may violate the agreement on his part, and recover of the vendor what has been paid, even though the latter has not violated any part of his agreement.

The case of *Murphy v. Lockwood*, 21 Ill. 611, is cited to show that appellant, in the case at bar, could not declare the contract forfeited without a return of what had been paid. A single sentence from the opinion of the court will show that the contract in that case was essentially different: "Another objection equally fatal to the offer of performance by the vendor is found in the fact that the contract nowhere imposes a forfeiture on default in any of the payments; and, therefore, the vendor, before he could rescind, should put the vendee in the same condition as before the making of the contract."

The absence of a provision in the contract making the time of performance or punctuality in the payments an essential condition, and of one authorizing the vendor to declare it forfeited for a failure to make punctual payments, is specifically noticed in this opinion, and constitutes an essential distinction between that case and the one at bar. Courts of law are not to amend or alter the contracts of parties; and where they agree, in unambiguous language, that, in case of a failure of the vendee to make his payments at the specified time, the vendor may declare the contract forfeited, we are unable to perceive upon what principle the courts can super-add a condition which the parties themselves did not see fit to impose. There is no question as to the general principle that where the parties have not themselves prescribed the right of rescission and the circumstances under which it may be exercised, restoration must be made. All of the other cases cited by appellee's counsel are of this latter class. And none of them tend to support the position that a vendee shall be permitted in a court of justice to obtain indemnity against the consequences of his own mere default.

From the authorities above cited, and others of like weight and respectability, we may deduce these rules: Where the vendee enters upon the performance of such a contract, and, paying part of the purchase-money, makes default which is inexcusable, and the vendor, being without fault, exercises the right given by the contract of

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declaring the same terminated, and in so doing acts fairly and within the scope of the power, then no action can be maintained by the vendee to recover back what he has paid. But a vendor, who is himself in fault, for fraud or violation of his contract, cannot exercise the power so given without making restoration of what he has received under it. In such case the law would imply a promise to repay the purchase-money received, and the equitable action for money had and received lie to recover it.

We do not, however, hold, or mean to be understood as holding that these rules cover the entire subject-matter. There may be cases where a vendee, chargeable with a technical default under such a contract, might, under particular circumstances, be entitled to other relief, as in a case where he had paid a large portion of the purchase-money, made valuable improvements upon the property, and his default was the result of fraud, accident or mistake; or the vendor should attempt to exercise the power of forfeiture in a case not fairly within its scope; or unfairly and oppressively, with the view of taking an undue advantage of the vendee by a forfeiture of payments and improvements; and in all other cases falling within the principles by which courts of equity are governed, the vendee may resort to such court to restrain the act of the vendor, if about to be done or, if accomplished, to set it aside, and to have the equities of the parties arising from their relations adjusted according to the circumstances of each case.

The case at bar presents no grounds for the action for money had and received, or relief in equity, within any of the above rules. The judgment of the court below must, therefore, be reversed and the cause remanded.

SCOTT, J., delivered a dissenting opinion in which LAWRENCE, C. J., concurred.

Judgment reversed.

CHICAGO AND NORTHWESTERN RAILWAY CO., appellant, v. THE
PEOPLE *ex rel.* HEMPSTEAD.

(56 ILL. 205.)

Railroad Company — mandamus to compel delivery of freight.

Although a railway company cannot be compelled to deliver freight beyond its own line, simply because there are connecting tracks over which it might pass by paying track service, but which it has never made a part of its own line, yet a writ of mandamus will lie compelling the company to deliver at an elevator situated upon tracks operated in common with other companies, notwithstanding the delivery may be at an additional expense, and the company may have contracted with other elevators for exclusive delivery to them.

APPLICATION for a mandamus. The opinion states the case.

James H. Howe, for appellant.

Gondy & Chandler, for appellees.

LAWRENCE, C. J. This was an application for a mandamus, on the relation of the owners of the Illinois river elevator, a grain warehouse in the city of Chicago, against the Chicago and Northwestern Railroad Company. The relators seek by the writ to compel the railway company to deliver to said elevator whatever grain in bulk may be consigned to it upon the line of its road. There was a return duly made to the alternative writ, a demurrer to the return, and a judgment *pro forma* upon the demurrer, directing the issuing of a peremptory writ. From that judgment the railway company has prosecuted an appeal.

The facts as presented by the record are briefly as follows:

The company has freight and passenger depots on the west side of the north branch of the Chicago river, north of Kinzie street, for the use, as we understand the record and the maps which are made a part thereof, of the divisions known as the Wisconsin and Milwaukee division of the road, running in a north-westerly direction. It also has depots on the east side of the north branch, for the use of the Galena division, running westerly. It has also a depot on the south branch, near Sixteenth street, which it reaches

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by a track diverging from the Galena line, on the west side of the city. The map indicates a line running north from Sixteenth street the entire length of West Water street, but we do not understand the relators to claim their elevator should be approached by this line, as the respondent has no interest in this line south of Van Buren street.

Under an ordinance of this city, passed August 10, 1858, the Pittsburgh, Fort Wayne and Chicago company, and the Chicago, St. Paul and Fond Du Lac company (now merged in the Chicago and Northwestern company), constructed a track on West Water street, from Van Buren street north to Kinzie street, for the purpose of forming a connection between the two roads. The Pittsburgh, Fort Wayne and Chicago company laid the track from Van Buren to Randolph street, and the Chicago, St. Paul and Fond Du Lac company that portion of the track from Randolph north to its own depot. These different portions of the track were, however, constructed by these two companies, by an arrangement between themselves, the precise character of which does not appear, but it is to be inferred from the record that they have a common right to the use of the track from Van Buren street to Kinzie, and do, in fact, use it in common. The elevator of the relators is situated south of Randolph street and north of Van Buren, and is connected with the main track by a side track laid by the Pittsburgh company, at the request and expense of the owners of the elevator, and connected at each end with the main track.

Since the 10th of August, 1866, the Chicago and Northwestern company, in consequence of certain arrangements and agreements on and before that day entered into between the company and the owners of certain elevators known as the Galena, Northwestern, Munn & Scott, Union, City, Munger and Armor, and Wheeler, has refused to deliver grain in bulk to any elevator except those above named. There is also in force a rule of the company, adopted in 1864, forbidding the carriage of grain in bulk if consigned to any particular elevator in Chicago, thus reserving to itself the selection of the warehouse to which the grain should be delivered. The rule also provides that grain in bags shall be charged an additional price for transportation. This rule is still in force.

The situation of these elevators, to which alone the company will deliver grain, is as follows: The Northwestern is situated near the depot of the Wisconsin division of the road, north of Kinzie street;

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the Munn & Scott on West Water street, between the elevator of relators and Kinzie street; the Union and City near Sixteenth street, and approached only by the track diverging from the Galena division on the west side of the city, already mentioned; and the others are on the east side of the north branch of the Chicago river. The Munn & Scott elevator can be reached only by the line laid on West Water street under the city ordinance already mentioned; and the elevator of relators is reached in the same way, being about four and a half blocks further south. The line of the Galena division of the road crosses the line on West Water street at nearly a right angle, and thence crosses the North Branch on a bridge. It appears by the return to the writ that a car coming into Chicago on the Galena division, in order to reach the elevator of relators, would have to be taken by a draw-bridge across the river on a single track, over which the great mass of the business of the Galena division is done, then backed across the river again upon what is known as the Milwaukee division of respondent's road, thence taken to the track on West Water street, and the cars, when unloaded, could only be taken back to the Galena division by a similar, but reversed, process, thus necessitating the passage of the draw-bridge, with only a single line, four times, and, as averred in the return, subjecting the company to great loss of time and pecuniary damage in the delay that would be caused to its regular trains and business on that division.

This seems so apparent that it cannot be fairly claimed the elevator of relators is upon the line of the Galena division, in any such sense as to make it obligatory upon the company to deliver upon West Water street freight coming over that division of the road. The doctrine of *The Vincent case*, in 49 Ill., was, that a railway company must deliver grain to any elevator which it had allowed, by a switch, to be connected with its own line. This rule has been re-affirmed in an opinion filed at the present term, in the case of *The People ex rel. Hempstead v. The Chicago and Alton Railroad Co.*, 55 Ill. 95. But in the last case we have also held that a railway company cannot be compelled to deliver beyond its own line, simply because there are connecting tracks over which it might pass by paying track service, but which it has never made a part of its own line by use.

So far as we can judge from this record, and the maps showing the railway lines and connections, filed as a part thereof, the Wisconsin and Milwaukee divisions, running north-west, and the Galena

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division, running west, though belonging to the same corporation and having a common name, are, for the purposes of transportation, substantially different roads, constructed under different charters, and the track on West Water street seems to have been laid for the convenience of the Wisconsin and Milwaukee divisions. It would be a harsh and unreasonable application of the rule announced in *The Vincent case*, and a great extension of the rule beyond any thing said in that case, if we were to hold that these relators could compel the company to deliver, at their elevator, grain which has been transported over the Galena division, merely because the delivery is physically possible, though causing great expense to the company and a great derangement of its general business, and though the track on West Water street is not used by the company in connection with the business of the Galena division.

What we have said disposes of the case so far as relates to the delivery of grain coming over the Galena division of respondent's road. As to such grain the mandamus should not have been awarded.

When, however, we examine the record as to the connection between the relators' elevator and the Wisconsin and Milwaukee divisions of respondent's road, we find a very different state of facts. The track on West Water street is a direct continuation of the line of the Wisconsin and Milwaukee division; cars coming on this track from these divisions do not cross the river. The Munn & Scott elevator, to which the respondent delivers grain, is, as already stated, upon a side track connected with this track. The respondent not only uses this track to deliver grain to the Munn & Scott elevator, but it also delivers lumber and other freight upon this track, thus making it not only legally, but actually, by positive occupation, a part of its road. The respondent, in its return, admits, in explicit terms, that it has an equal interest with the Pittsburg, Fort Wayne and Chicago railroad in the track laid in West Water street. It also admits its use, and the only allegation made in the return for the purpose of showing any difficulty in delivering to relators' elevator the grain consigned thereto from the Wisconsin and Milwaukee divisions, is that those divisions connect with the line on West Water street only by a single track, and that respondent cannot deliver bulk grain or other freight to the elevator of relators, even from those divisions, without large additional expense, caused by the loss of the use of motive power, labor of

servants, and loss of use of cars, while the same are being delivered and unloaded at said elevator and brought back. As a reason for non-delivery on the ground of difficulty, this is simply frivolous. The expense caused by the loss of the use of motive power, labor and cars, while the latter are being taken to their place of destination and unloaded, is precisely the expense for which the company is paid its freight. It has constructed this line on West Water street in order to do the very work which it now, in general terms, pronounces a source of large additional expense; yet it does not find the alleged additional expense an obstacle in the way of delivering grain upon this track at the warehouse of Munn & Scott, or delivering other freights to other persons than the relators. Indeed, it seems evident, from the diagrams attached to the record, that three of the elevators, to which the respondent delivers grain, are more difficult of access than that of the relators, and three of the others have no appreciable advantage in that respect, if not placed at a decided disadvantage, by the fact that they can be reached only by crossing the river.

We presume, however, from the argument, that the respondent's counsel place no reliance upon this allegation of additional expense, so far as the Wisconsin and Milwaukee divisions are concerned. They rest the defense on the contracts made between the company and the elevators above named, for exclusive delivery to the latter, to the extent of their capacity. This brings us to the most important question in the case. Is a contract of this character a valid excuse to the company for refusing to deliver grain to an elevator, upon its lines and not a party to the contract, to which such grain has been consigned?

In the oral argument of this case it was claimed, by counsel for the respondent, that a railway company was a mere private corporation, and that it was the right and duty of its directors to conduct its business merely with reference to the pecuniary interests of the stockholders. The printed arguments do not go to this extent, in terms, but they are colored throughout by the same idea, and in one of them we find counsel applying to the supreme court of the United States, and the supreme court of Pennsylvania, language of severe, and almost contemptuous, disparagement, because those tribunals have said, that "a common carrier is in the exercise of a sort of public office." *N. J. Steam Nav. Co. v. Merch. Bank.* 6 How. 381; *Sanford v. Railroad Co.*, 24 Penn. 380. If the language is

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not critically accurate, perhaps we can pardon these courts, when we find that substantially the same language was used by Lord Holt, in *Coggs v. Bernard*, 2 Ld. Raym. 909, the leading case in all our books on the subject of bailments. The language of that case is, that the common carrier "exercises a public employment."

We shall engage in no discussion in regard to names. It is immaterial whether or not these corporations can be properly said to be in the exercise of "a sort of public office," or whether they are to be styled private, or *quasi* public corporations. Certain it is, that they owe some important duties to the public, and it only concerns us now to ascertain the extent of these duties as regards the case made upon this record.

It is admitted by respondent's counsel, that railway companies are common carriers, though even that admission is somewhat grudgingly made. Regarded merely as a common carrier at common law, and independently of any obligations imposed by the acceptance of its charter, it would owe important duties to the public, from which it could not release itself, except with the consent of every person who might call upon it to perform them. Among these duties, as well defined and settled as any thing in the law, was the obligation to receive and carry goods, for all persons alike, without injurious discrimination as to terms, and to deliver them in safety to the consignee, unless prevented by the act of God or the public enemy. These obligations grew out of the relation voluntarily assumed by the carrier toward the public, and the requirements of public policy, and so important have they been deemed, that eminent judges have often expressed their regret that common carriers have ever been permitted to vary their common-law liability, even by a special contract with the owner of the goods.

Regarded, then, merely as a common carrier at common law, the respondent should not be permitted to say, it will deliver goods at the warehouse of A and B, but will not deliver at the warehouse of C, the latter presenting equal facilities for the discharge of freight, and being accessible on respondent's line.

But railway companies may well be regarded as under a higher obligation, if that were possible, than that imposed by the common law, to discharge their duties to the public as common carriers fairly and impartially. As has been said by other courts, the State has endowed them with something of its own sovereignty, in giving them the right of eminent domain. By virtue of this power, they

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take the lands of the citizen against his will and can, if need be, demolish his house. Is it supposed these great powers were granted merely for the private gain of the corporators? On the contrary, we all know the companies were created for the public good.

The object of the legislature was to add to the means of travel and commerce. If, then, a common carrier at common law came under obligations to the public from which he could not discharge himself at his own volition, still less should a railway company be permitted to do so, when it was created for the public benefit and has received from the public such extraordinary privileges. Railway charters not only give a perpetual existence and great power, but they have been constantly recognized by the courts of this country as contracts between the companies and the State, imposing reciprocal obligations.

The courts have always been, and we trust always will be, ready to protect these companies in their chartered rights, but, on the other hand, we should be equally ready to insist that they perform faithfully to the public those duties which were the object of their chartered powers.

We are not, of course, to be understood as saying or intimating, that the legislature, or the courts, may require from a railway company the performance of any and all acts that might redound to the public benefit, without reference to the pecuniary welfare of the company itself. We held, simply, that it must perform all those duties of a common carrier to which it knew it would be liable when it sought and obtained its charter, and the fact that the public has bestowed upon it extraordinary powers is but an additional reason for holding it to a complete performance of its obligations.

The duty sought to be enforced in this proceeding, is the delivery of grain in bulk to the warehouse to which it is consigned, such warehouse being on the line of the respondent's road, with facilities for its delivery equal to those of the other warehouses at which the company does deliver, and the carriage of grain in bulk being a part of its regular business. This, then, is the precise question decided in *The Vincent case*, 49 Ill. , and it is unnecessary to repeat what was there said. We may remark, however, that, as the argument of counsel necessarily brought that case under review, and as it was decided before the reorganization of this court under the new constitution, the court as now constituted has re-examined that decision,

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and fully concurs therein. That case is really decisive of the present, so far as respects grain transported on the Wisconsin and Milwaukee divisions of respondent's road. The only difference between this and the Vincent case is, in the existence of the contract for exclusive delivery to the favored warehouses, and this contract can have no effect when set up against a person not a party to it, as an excuse for not performing toward such person those duties of a common carrier prescribed by the common law, and declared by the statute of the State.

The contract in question is peculiarly objectionable in its character, and peculiarly defiant of the obligations of the respondent to the public as a common carrier. If the principle implied in it were conceded, the railway companies of the State might make similar contracts with individuals at every important point upon their lines, and in regard to other articles of commerce besides grain, and thus subject the business of the State almost wholly to their control, as a means of their own emolument. Instead of making a contract with several elevators, as in the present case, each road that enters Chicago might contract with one alone, and thus give to the owner of such elevator an absolute and complete monopoly in the handling of all the grain that might be transported over such road. So too, at every important town in the interior, each road might contract that all the lumber carried by it should be consigned to a particular yard. How injurious to the public would be the creation of such a system of organized monopolies in the most important articles of commerce, claiming existence under a perpetual charter from the State, and, by the sacredness of such charter, claiming also to set the legislative will itself at defiance, it is hardly worth while to speculate. It would be difficult to exaggerate the evil of which such a system would be the cause, when fully developed, and managed by unscrupulous hands.

Can it be seriously doubted whether a contract, involving such a principle and such results, is in conflict with the duties which the company owes to the public as a common carrier? The fact that a contract has been made is really of no moment, because, if the company can bind the public by a contract of this sort, it can do the same thing by a mere regulation of its own, and say to these relators that it will not deliver at their warehouse the grain consigned to them, because it prefers to deliver it elsewhere. The contract, if vicious in itself, so far from excusing the road, only shows that the

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policy of delivering grain exclusively, at its chosen warehouses, is a deliberate policy to be followed for a term of years, during which these contracts run.

It is, however, urged very strenuously by counsel for the respondent, that a common carrier, in the absence of contract, is bound to carry and deliver only according to the custom and usage of his business; that it depends upon himself to establish such custom and usage; and that the respondent, never having held itself out as a carrier of grain in bulk, except upon the condition that it may itself choose the consignee, this has become the custom and usage of its business, and it cannot be required to go beyond this limit. In answer to this position, the fact that the respondent has derived its life and powers from the people, through the legislature, comes in with controlling force. Admit, if the respondent were a private association, which had established a line of wagons for the purpose of carrying grain from the Wisconsin boundary to the elevator of Munn & Scott, in Chicago, and had never offered to carry or deliver it elsewhere, that it could not be compelled to depart from the custom or usage of its trade. Still the admission does not aid the respondent in this case. In the case supposed, the carrier would establish the terminal points of his route at his own discretion, and could change them as his interests might demand. He offers himself to the public only as a common carrier to that extent, and he can abandon his first line and adopt another at his own volition. If he should abandon it, and, instead of offering to carry grain only to the elevator of Munn & Scott, should offer to carry it generally to Chicago, then he would clearly be obliged to deliver it to any consignee in Chicago to whom it might be sent, and to whom it could be delivered, the place of delivery being upon his line of carriage.

In the case before us, admitting the position of counsel that a common carrier establishes his own line and terminal points, the question arises, at what time and how does a railway company establish them? We answer, when it accepts from the legislature the charter which gives it life, and by virtue of such acceptance. That is the point of time at which its obligations begin. It is then that it holds itself out to the world as a common carrier, whose business will begin as soon as the road is constructed upon the line which the charter has fixed. Suppose this respondent had asked from the legislature a charter authorizing it to carry grain in bulk, to be delivered only at the elevator of Munn & Scott, and nowhere else in the

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city of Chicago. Can any one suppose such charter would have been granted? The supposition is preposterous. But, instead of a charter making a particular elevator the terminus and place of delivery, the legislature granted one which made the city of Chicago itself the terminus, and when this charter was accepted there at once arose, on the part of the respondent, the corresponding obligation to deliver grain at any point within the city of Chicago, upon its lines, with suitable accommodations for receiving it, to which such grain might be consigned. Perhaps grain in bulk was not then carried in cars, and elevators may not have been largely introduced. But the charter was granted to promote the conveniences of commerce, and it is the constant duty of the respondent to adapt its agencies to that end. When these elevators were erected in Chicago, to which the respondent's line extended, it could only carry out the obligations of its charter by receiving and delivering to each elevator whatever grain might be consigned to it, and it is idle to say such obligation can be evaded by the claim that such delivery has not been the custom or usage of respondent. It can be permitted to establish no custom inconsistent with the spirit and object of its charter.

It is claimed by counsel that the charter of respondent authorizes it to make such contracts and regulations as might be necessary in the transaction of its business. But certainly we cannot suppose the legislature intended to authorize the making of such rules or contracts as would defeat the very object it had in view in granting the charter. The company can make such rules and contracts as it pleases, not inconsistent with its duties as a common carrier, but it can go no further, and any general language which its charter may contain must necessarily be construed with that limitation. In the case of *The City of Chicago v. Rumpff*, 45 Ill. 94, this court held a clause in the charter, giving the common council the right to control and regulate the business of slaughtering animals, did not authorize the city to create a monopoly of the business, under pretense of regulating and controlling it.

It is unnecessary to speak particularly of the rule adopted by the company in reference to the transportation of grain. What we have said in regard to the contract applies equally to the rule.

The principle that a railroad company can make no injurious or arbitrary discrimination between individuals, in its dealings with the public, not only commends itself to our reason and sense of justice,

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but is sustained by adjudged cases. In England, a contract which admitted to the door of a station, within the yard of a railway company, a certain omnibus, and excluded another omnibus, was held void. *Marriot v. L. & S. W. R. Co.*, 87 Eng. Com. Law, 498.

In *Gaston v. Bristol & Exeter Railroad Company*, 95 Eng. Com. Law, 641, it was held that a contract with certain iron mongers, to carry their freight for a less price than that charged the public, was illegal, no good reason for the discrimination being shown.

In *Crouch v. The L. & N. W. R. Co.*, 78 Eng. Com. Law, 254, it was held a railway company could not make a regulation for the conveyance of goods which, in practice, affected one individual only.

In *Sandford v. Railroad Company*, 24 Penn. 382, the court held that the power given in the charter of a railway company to regulate the transportation of the road did not give the right to grant exclusive privileges to a particular express company. The court say: "If the company possesses this power, it might build up one set of men and destroy others, advance one kind of business and break down another, and make even religion and politics the tests in the distribution of its favors. The rights of the people are not subject to any such corporate control."

We refer also to *Rogers' Locomotive Works v. Erie R. R. Co.*, 5 Green. 380, and *State v. Hartford & N. H. R. Co.*, 29 Conn. 538.

It is insisted by counsel for the respondent that, even if the relators have just cause of complaint, they cannot resort to the writ of mandamus. We are of opinion, however, that they can have an adequate remedy in no other way, and that the writ will, therefore, lie.

The judgment of the court below awarding a peremptory mandamus must be reversed, because it applies to the Galena division of respondent's road as well as to the Wisconsin and Milwaukee division. If it had applied only to the latter, we should have affirmed the judgment. The parties have stipulated that, in case of reversal, the case shall be remanded, with leave to the relators to traverse the return. We, therefore, make no final order, but remand the case, with leave to both parties to amend their pleadings, if desired, in view of what has been said in this opinion.

Judgment reversed.

Walker v. Crawford.

WALKER, appellant, v. CRAWFORD.

(56 Ill. 444.)

Promissory note — parol evidence.

In an action by the payee against the maker of a promissory note, absolute on its face; *held*, that parol evidence was inadmissible to show that it was conditional.

ACTION on a promissory note by Crawford, payee, against Walker, maker. The opinion states the point at issue. Judgment for plaintiff; defendant appealed.

J. N. Barker, William Hopkins and T. J. Tuley, for appellant.

Spafford, McDaid & Wilson, for appellees.

BREESE, J. The only question presented by this record is as to the admissibility of the evidence offered to sustain the notice accompanying the plea of the general issue.*

* This notice was as follows: "The plaintiff will take notice that the defendant, on the trial of this cause, will give in evidence and insist that, before and at the time of the making and delivering of the promissory note mentioned and set out in the plaintiff's declaration, the schooner *Australia*, whereof this defendant was agent, then lying at the port of Chicago, was in the custody of the United States Marshal for the northern district of Illinois, under monition issued out of the district court of the United States for the northern district of Illinois, upon a certain libel then pending in the said court, wherein the said John A. Crawford was libellant and the said schooner *Australia* was defendant, and so, being in such custody, it was agreed by and between the plaintiff and defendant in this cause as follows:

"That this defendant should, within thirty days from the 17th of October, 1868, pay to the said plaintiff the sum claimed by said libel, together with costs upon the same, and make and deliver unto the plaintiff the promissory note sued on in this cause, as collateral to, and security for, the fulfillment of his, the defendant's, agreement to pay the aforesaid sum of money, and, in consideration thereof, the said plaintiff agreed to dismiss the aforesaid libel and discharge the said vessel from the custody of said marshal, and that, upon such agreement of the said parties respectively, the said plaintiff did cause the said vessel to be released and discharged from the custody of said marshal and the aforesaid libel to be dismissed, and the said defendant made and delivered to the plaintiff, as security as aforesaid, the said promissory note; that afterward, and within ninety days from the said 17th day of October, A. D. 1868, this defendant tendered and offered to pay unto the said plaintiff, in lawful money, the sum of \$67.07, in fulfillment and performance of this promise and agreement to pay unto the plaintiff the sum claimed in the aforesaid libel and costs thereupon; that the sum claimed by said libel, together with costs, was the sum of \$67.07, and that the said plaintiff thereupon refused to accept the said sum.

"And this defendant here renews his aforesaid offer and tender, and now brings into court the aforesaid sum of \$67.07."

The substance of the notice is, that the note was delivered conditionally, or as collateral security for the performance of a parol promise or agreement by appellant.

Appellant, not denying or questioning the rule of law so long established, that parol testimony is inadmissible to vary the terms of a written contract, seems to intimate there is some inconsistency in the decisions of this court, at least as to the application of this rule.

Under point five in his brief, he contends that the evidence excluded would have proved that the consideration of the note had wholly or in part failed, and under that head calls attention to *Mager v. Hutchinson*, 2 Gilm. 267. That case decides only that, when a contract is reduced to writing, the writing affords the only evidence of its terms and conditions. It cannot be contradicted or varied by the previous or contemporaneous verbal agreements of the parties. These are all regarded as merged in the written contract.

The agreement sought to be established by parol in this case, which was an action of debt on a promissory note executed by one Mager and De Lassoule to the plaintiff, the latter being alone served with process, was, that at the time of the execution of the note, it was understood that De Lassoule was to be liable for its payment only in the event that the money could not be collected of Mager, averring that no effort had been made to collect it of Mager.

Scammon v. Adams et al., 11 Ill. 575, was a case where it had been agreed between the indorser of the note and the indorsee, to whom the indorser was indebted, that he should refund to the indorser the surplus of the note, after paying himself. The court say that parol evidence may be introduced to show this understanding, without violating the rule that a written contract cannot be contradicted by parol proof.

Penny v. Graves, 12 Ill. 287, merely reiterates the familiar doctrine that a party may show by parol a note was given without consideration, or that the consideration has wholly or in part failed, and to impeach the consideration of a note, but not to vary its terms.

Ward v. Stout, 32 Ill. 399, decides a joint maker of a note may plead and prove he signed the note as surety only. The court say such proof does no violence to the rule that a written instrument cannot be varied by parol, for it does not affect the terms of the contract, but establishes a collateral fact merely, and rebuts a presump-

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tion. To sustain this view, *Flynn v. Mudd et al.*, 27 Ill. 323; *Harris v. Brooks*, 21 Pick. 195; *Carpenter v. King*, 9 Metc. 50; *Archer v. Douglass*, 5 Denio, 509; *Bank of Steubenville v. Leavitt et al.*, 5 Ohio (Ham.) 207, and 1 Pars. on Bills and Notes, 233, were referred to. Parsons says the weight of authority and principle are in favor of the admission of such evidence, page 234. It certainly should be the rule between the maker and payee.

Daggett v. Gage, 41 Ill. 465, does contain an intimation apparently inconsistent with the previous ruling of the court in *Ward v. Stout*, *supra*, but it affirms the doctrine that the terms of a written contract cannot be varied by parol proof.

We fail to see, in the cases cited, any departure from this rule. The proof offered by plaintiff went to show a contract entirely different from the one shown by the note. It tended to show the note, which was on its face absolute, was, in fact, conditional only. Had he pleaded the facts as payment, as in the case of *Hagood v. Swords*, 2 Bailey (S. C.) 305, or that the note which was given without consideration, or that the consideration had wholly or in part failed, the evidence might have been admissible under repeated rulings of this court and other courts. That defense is given by statute.

The rule we understand to be inflexible, that the maker of an absolute note cannot show, against the payee, an oral contemporaneous agreement which makes the note payable only on a contingency. 2 Pars. on Notes and Bills, 508, and the numerous cases and illustrations there given. *Foy v. Blackstone*, 31 Ill. 541.

We have intimated the defendant might have pleaded want of consideration, or a total or partial failure of consideration. A case is reported in 1 Hill, 116 (*Payne v. Ladue*), which sustains this suggestion. There, the consideration of the note was, that the payee should give up certain notes, discontinue certain suits, and sign a retraction of an alleged slander, and, on his failure to do these things the note was to be void. The payee gave up the notes and the suits, but did not sign the retraction, yet his parol agreement to do so, could not be let in to contradict the absolute note. If the retraction had been the sole consideration for the note, the oral agreement to retract would have been a good defense, on the ground of want of consideration. But, where only part of the consideration fails, an action on the agreement is the only just remedy, and the terms of the note cannot be changed.

The authorities cited by appellant fail to sustain the position he has taken.

The note could not be an escrow, as it was delivered to the payee. An escrow is delivered to a stranger or third party. But the notice was not to the effect, it was delivered as an escrow. In *Hagood v. Swords*, *supra*, the court considered the agreement as equivalent to payment of a note. In *Couch v. Meeker*, 2 Conn. 302, the condition was in writing and indorsed on the note, but the judgment was against the defendant. In the case of *Vallett v. Parker*, 6 Wend. 615, the defendant offered to prove that the note was delivered to a third person, as an escrow, and that he had fraudulently put it in circulation.

In *Woodhull v. Holmes*, 10 Johns. 230, the point was, a want of consideration for the note, the proof being that the note was made and delivered to a third person to carry to the bank, for discount, and, instead of this being done, this person placed it in the hands of a broker.

The authorities are overwhelming to this point: A note, absolute on its face, cannot be shown by parol to have been conditional.

There is no error in the judgment, and it must be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
NEVADA.

COOPER, appellant, v. PACIFIC MUTUAL INSURANCE COMPANY OF
CALIFORNIA.

(7 Nev. 116.)

Life insurance — when policy attaches.

An application was made to the agent of defendant for a policy of insurance on the life of plaintiff's husband, the applicant paying \$50, according to the rules of defendant, to be applied on the first year's premium, if the insurance should be effected. The application was forwarded to defendant's office, and a policy was made out and sent to the agent for delivery; but the insured having died two days after the policy was issued but before its delivery, the agent refused to deliver it, although the balance of the premium was offered to be paid. *Held*, that the policy had attached.

ACTION on a policy of life insurance against defendant, a company organized and resident in California. The application was made to the agent of defendant in Nevada. The policy was issued at Sacramento, Cal., the principal office of defendant, November 5, 1870, and the insured died November 7, 1870. The opinion states the material facts. Plaintiff was non-suited, whereupon she appealed.

R. S. Mesick, for appellant.

Mitchell & Stone, for respondent.

Cooper v. Pacific Mutual Insurance Company of California.

LEWIS, C. J. (after disposing of questions of practice). Was the court warranted in granting the nonsuit? Clearly not. The plaintiff introduced evidence going to prove that an application was made to the agents of defendant for a policy of insurance on the life of the plaintiff's husband; that, at the time the application was made, \$50 was paid, according to the regulations of the company, which was to be applied on the first year's premium, provided the defendant should conclude to make the insurance. The application thus made was forwarded to the proper office of the company; a policy was in due time made out and forwarded to the agent in this State for delivery, but the insured having died before it was delivered, the agent refused to deliver it, although demanded, and the balance of the premium offered to be paid.

Here is undoubtedly sufficient proof to establish a contract for a policy. The application for a policy by the assured, with the payment of a portion of the premium, and acceptance of the risk by the defendant, left nothing to be done but the delivery of the policy and the payment of the plaintiff of the balance of the premium, which, it appears, was not required by the rules of the company until the completion of the transaction. These facts show a valid contract for a policy between the parties. The moment the company concluded to make the insurance, the \$50 paid to its agent became its property, without any further action on its part. It was paid upon the condition that, if the company concluded to make the insurance, it should be applied in payment of the premium; when, therefore, the risk was taken, it became the property of defendant, and at the same time the assured became entitled to the policy. Thus, there was the acceptance of the application by the company and the payment of a portion of the premium, as a consideration therefor, by the plaintiff, which is all that was necessary to make a valid contract between the parties. Such contracts are as available to sustain an action for the amount of the insurance as if the policy itself had been issued. In *Kohne v. The Insurance Company of North America*, 1 Wash. C. C. 93, a person applied to the agent of the company to effect an insurance on goods on board a ship, and settled all the terms of the insurance, but did not receive a policy. It was, however, soon afterward filled up and executed, and about the same time the company received the intelligence of the loss of the vessel. On a subsequent day the assured called to pay the premium and receive the policy, but the company

Ex-parte Martin.

refused to deliver it, objecting that the agreement was inchoate, and consequently it had the right to retract. Judge WASHINGTON, however, said: "It appears every thing was agreed upon, and although, on account of the fever then in the city, he did not wait to receive the policy, yet it was, immediately after he left the office, filled up and signed by the president, and has been produced on the trial; the contract, therefore, was not inchoate, but perfected before notice of the capture by either party." So it has frequently been held that the premium may be received on a mere contract to insure, where no policy has been made out; and such, we take it, is the law. *Carpenter v. The Mutual Safety Insurance Co.*, 4 Sandf. Ch. 408; *Hamilton v. Lycoming Insurance Co.*, 5 Barr. 339; *Andrews v. The Essex Fire and Marine Insurance Co.*, 3 Mason's C. C. R. C.; *McCullough v. Eagle Insurance Co.*, 1 Pick. 278; *Palm v. Medina Insurance Co.*, 20 Ohio, 529; *Taylor v. Merchants' Fire Insurance Co.*, 9 How. (U. S.) 390.

The nonsuit must be set aside.

Judgment reversed. It is so ordered.

Ex-parte MARTIN.

(7 Nev. 140.)

Constitutional law — validity of State stamp act

The Nevada stamp act, requiring revenue stamps upon bills of exchange drawn in that State and payable in another State, is a valid exercise of the taxing power, and is not in conflict with the United States Constitution.

HABEAS CORPUS to procure the release of the petitioner, imprisoned for non-payment of a penalty incurred by not affixing a stamp to a bill of exchange drawn at Virginia City, Nevada, and payable at San Francisco, California. The case involves the validity of the Nevada stamp act.

Wm. S. Wood, for petitioner.

L. A. Buckner, attorney-general, for State.

GARBER, J. The statute under which the petitioner was convicted (Stats. of 1871, 142), requires the affixing of a stamp to such a bill

as that drawn by him. It levies upon foreign bills the same rate of duty imposed upon inland bills; but it does not extend to the former the exemption accorded to the latter.

The statute is not a regulation of commerce between this and other States, nor does it lay an impost or duty on exports, within the meaning of sections 8 and 10 of article 1 of the constitution of the United States. Though this may not have been directly decided by the supreme court of the United States, it follows from and is the necessary result of the reasoning of that court in *Nathan v. Louisiana*, 8 How. 73, and *Paul v. Virginia*, 8 Wall. 168. In *Paul v. Virginia*, the proposition that foreign bills of exchange, although instruments of commerce, are the subjects of State regulation, and may be subjected to direct State taxation, is assumed as the logical result of the principle enunciated in *Nathan v. Louisiana*. This assumption was not a mere *dictum*, but was virtually a decision affirming the proposition thus made the basis of the later adjudication, and to the consideration of which as "a main part of the argument," the attention of the court was pointedly directed. 5 Taun. 159. It is also fully sustained by the argument of Chief Justice TANEY, in the *Passenger cases*. He says: "I may, therefore, safely assume that, according to the true construction of the constitution, the power granted to congress to regulate commerce did not in any degree abridge the power of taxation in the States. They are expressly prohibited from laying any duty on imports or exports, except what may be absolutely necessary for executing their inspection laws, and also from laying any tonnage duty. So far their taxing power over commerce is restrained, but no farther. They retain all the rest; and if the money demanded is a tax upon commerce, or the instrument or vehicle of commerce, it furnishes no objection to it, unless it is a duty on imports or a tonnage duty, for these alone are forbidden."

A bill of exchange is neither an export nor an import, but it would make no difference if it were; for the term "export" in the clause of the constitution referred to, embraces only articles exported to foreign countries, and does not include those exported from one State into another. 8 Wall. 123. It follows that the enactment of the statute in question was a legitimate exercise by the State of her inherent and unsundered power of taxation. The petitioner is remanded to the custody whence he came.

Meadow Valley Mining Co. v. Dodds.

MEADOW VALLEY MINING Co., appellant, v. DODDS.

(7 Nev. 142.)

Transfer of cause from State to federal court — affidavits.

Where a citizen of one State commences an action against a citizen of another State in the courts of the latter State, the plaintiff is, nevertheless, entitled, afterward, to have the cause removed to the United States courts, under act of congress of March 2, 1867. The affidavits in such a case need not set forth the facts on which the applicant for the transfer bases his belief that local prejudice exists; it is sufficient if they state that he has reason to, and does, believe that such local prejudice exists, as will prevent his obtaining justice. (*See note, 7 Am. R. 507.*)

ACTION in which the Meadow Valley Mining Company, a corporation organized under the laws of California, is now sole plaintiff, and Dodds and others, citizens of the State of Nevada, are defendants. The questions involved arise on an application on the part of plaintiff, for a removal of the cause from the Nevada State courts to the United States courts.

Ashley & Thornton, for the appellant.

Pitzer & Corson and *G. S. Sawyer*, for the respondent.

LEWIS, C. J. The plaintiff applied for a removal of this action into the circuit court of the United States, under the act of congress of March 2, 1867, which provides: "That where a suit is now pending, or may hereafter be brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of \$500, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit stating that he has reason to, and does, believe that, from prejudice or local influence, he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next circuit court of the United States, to be held in the district where the suit

was pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony and other proceedings in said suit, and doing such other appropriate acts as by the act to which this act is amendatory are required to be done upon the removal of a suit into the United States court; and it shall be thereupon the duty of the State court to accept the surety and proceed no further in the suit." The application in all respects conformed to the provisions of the act, but the court below refused to transfer the cause. Exception was taken to the ruling, and counsel for plaintiff refused to proceed further in the matter, whereupon judgment was rendered against it. The question is thus presented, whether the court below erred in refusing to order a transfer of the suit to the circuit court, as required by the act above quoted. To determine the question, it is necessary to ascertain: first, whether the act authorizing the transfer is constitutional; and second, whether the application conformed to the requirements of the act.

Article 3 of the Federal Constitution declares that the judicial power of the United States shall extend *inter alia* to all cases between citizens of different States; and subdivision 17, section 8, article 2, confers the power upon congress to make all laws which shall be necessary and proper for carrying into effect all the powers vested by the constitution in the government of the United States, or in any department or officer thereof. Here is full control and jurisdiction vested in the federal government over all suits "between citizens of different States." The language is broad and comprehensive, extending the jurisdiction to all controversies between citizens of different States. It is given in general terms. No limitation is imposed, no exception mentioned. There being nothing in the constitution itself which restrains or limits this power, it must be maintained in the utmost latitude to which in its own nature it is susceptible.

Nor is the time when, nor the manner in which, jurisdiction of such cases shall be assumed, in any way prescribed. To give the power full and complete effect, therefore, it must be held that congress may assume jurisdiction of the cases enumerated at any stage, by vesting it absolutely and exclusively in the federal courts. If this power be vested in the federal government by the constitution, without limitation or restriction, by what process of reasoning can it be maintained that it cannot assume such control after the parties

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have submitted to the jurisdiction of the State courts? If the power be unrestricted, then it may be exercised at any time while it can be said that a controversy exists between parties. There is no warrant in the grant of power for restricting its exercise to cases where the person invoking the federal authority has not submitted to the jurisdiction of the State courts. To so hold, would be to circumscribe the power and limit its scope.

The power, as conferred, authorizes the assumption of jurisdiction of *all* cases between citizens of different States; and as the greater includes the less, it justifies the assumption of jurisdiction of such controversies, although the parties may have submitted to the jurisdiction of a State court; for notwithstanding that fact, it is still a controversy between citizens of different States, and continues so at least until the matter is determined by a judgment. We are aware that a different view was taken by a majority of the court in the case of *Whitton v. The Chicago and North Western Railroad Co.*, 25 Wis. 424; but the reasoning by which the conclusion is attained, if none better can be adduced, is convincing evidence that the decision is erroneous. It is argued that the plaintiff, by instituting his action in the State court, waived his right to appeal to the federal courts for a decision of the matter in controversy. The process of reasoning is, first, that as he had the right to appeal either to the State or federal courts, and selected the former, therefore he waived the right afterward to have it transferred to the latter. Indeed the whole opinion is condensed in these concluding sentences: "It seems to me that, on principle and reason, it should be held that the plaintiff, by bringing his suit in the State court when he might have brought it in the federal court, has clearly waived his right to appeal to the latter tribunal, and that this waiver binds him through the litigation. As plaintiff, he has voluntarily elected the jurisdiction of the State court, and there is no hardship in requiring him to abide its decision." And therefore, upon this reasoning, the court concludes that the section of the act of congress is unconstitutional. It is conceded by the court that the act of 1789, authorizing removals on the motion of defendants, is constitutional; but a distinction is thought to exist between that and the act in question, giving the same right to plaintiffs.

This decision is certainly a curiosity in the field of logic. A more bold and palpable *non sequitur* than the conclusion drawn from the

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reasoning could not be imagined. It is perfectly manifest, if the act is unconstitutional, there was nothing which the plaintiff could waive; for, without the act, it is admitted he could not remove his action to the federal courts, and it must also be admitted that, if the act be constitutional, his motion to remove should have been sustained, because the court concedes that he complied strictly with its requirements. Now, then, what has the question of waiver by first bringing his action in the State court to do with the question? It is just such a case that the law of congress is intended to meet. If, therefore, the party making the application to remove, in all respects comes within the provisions and complies with the requirements of the statute, there is but one question left to be determined, and that is: Did congress have the power to pass the act? But surely, if the federal constitution confers the power on congress, the fact that a person has waived a right conferred by it in the legitimate exercise of that power, cannot be claimed to be a proof that the power does not exist. That the learned judges who rendered the decision in *Whiton v. The Chicago and Northwestern Railroad Co.* fell into error, seems to us too clear to admit of doubt.

Upon the second question in this case but little need be said. It is admitted the affidavit is sufficient in all respects, except that it does not set out the facts upon which the appellant bases his belief that such local prejudice existed that he could not obtain justice. It will be observed that the statute only requires the person moving to have the case transferred to make and file an affidavit *stating* that he has reason to, and does, believe that from prejudice or local influence he will not be able to obtain justice in such State court. The statute specifies what the affidavit shall contain. It does not require the existence of local prejudice, or the fact that justice cannot be obtained in consequence thereof, to be *shown* or proven to the satisfaction of the court to whom the application is made. If the act required that fact to be *shown*, then, in conformity to decisions upon like statutes, it would be necessary to state the facts upon which the applicant founded his belief. But here the statute only requires the person making the affidavit to *state* the fact. There is an obvious and material distinction between *showing* a fact and stating it. In the one case, satisfactory proof may be required; in the other, the mere recital of the fact is sufficient. The affidavit in this case does state the fact, that from local prejudice the affiant

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cannot obtain justice, and thus it comes strictly within the letter of the statute.

The court below erred in denying the motion. Its judgment must, therefore, be reversed.

Judgment reversed.

STATE *ex rel.* STOUTMEYER v. DUFFY.

(7 Nov. 1868.)

Constitutional law — education of colored persons. Mandamus.

A mandamus will lie compelling trustees to admit colored persons to the public schools, where separate schools are not provided for such persons.

APPLICATION for a mandamus compelling the board of trustees of a school district to admit a negro, between the age of six and sixteen, to the public school.

T. W. W. Davies, for relator.

A. C. Ellis and *R. M. Clarke*, for respondent.

WHITMAN, J. Relator asks a mandamus compelling defendants to admit him into the public school of which they are trustees. They object that the remedy sought should not be granted: first, because they have not the power to admit nor to deny admission; second, because the applicant is a negro.

The power to admit to the public schools is not in words conferred upon trustees in this State, but it is so inseparably connected with their specified powers, and so inevitably a conclusion therefrom, that no argument is needed to prove its necessary existence. *Stata*. 1864, 1865, p. 413; 1867, p. 89. The trustees have general control and supervision; and while they may not see fit to require any applicant for school privileges to obtain from them an order of admission, they have the power to make such a regulation; and, upon the other hand, every person qualified under the law to attend the public schools is entitled to such an order upon due demand.

The question then is, what qualifies a person to receive such an order? The applicant must be over six and under eighteen years of age, and ordinarily a resident of the district where admission is sought. So being, it is contended for relator that admission follows as of absolute right. While it would probably be unsafe to admit the proposition in its stated breadth, as it might be subject to qualification by reasonable rule, as to moral obliquity or mental incapacity, it may be accepted for this case, wherein it is unnecessary to look minutely into the matter, as the only ground for refusal here was the race of the applicant. The trustees yield obedience to the statute, which prescribes that "Negroes, Mongolians and Indians shall not be admitted into the public schools, but the board of trustees may establish a separate school for their education, and use the public school funds for the support of the same." Stat. 1867, p. 95, § 50. To this relator replies that such statute is opposed to the constitution and laws of the United States, and to the constitution of the State of Nevada.

While it may be, and probably is, opposed to the spirit of the former, still it is not obnoxious to their letter; and as no judicial action is more dangerous than that most tempting and seductive practice of reading between the written lines, and interpolating a spirit and intent other than that to be reached by ordinary and received rules of construction or interpretation, such course will be declined, and reference at once had to the constitution of this State. What says that? "The legislature shall provide for an uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year; * * * and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public school." Const., art. 11, § 2. It is further provided in that article, of certain pledged revenues, that "the interest thereon shall, from time to time, be apportioned among the several counties in proportion to the ascertained numbers of the persons between the ages of six and eighteen years in the different counties." * * * Section 3.

These are the only references made to, or designation of, the beneficiaries of the school fund. Either something or nothing is provided as to such. If the constitution provides any thing in the language quoted, it provides for the education of all children of the State, between the ages of six and eighteen years, by means of an

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uniform system of common schools, open six months at least every year, and that the legislature may legislate to secure a general attendance thereon. Waiving the point that "may" should read "shall" in the last sentence, yet when the legislature has acted, can it be said to have done so in accordance with the constitution when it prohibits the attendance of any children within the stated ages upon the schools erected as common schools, and supported by the funds pledged thereto? Can such schools be schools common to all children of appropriate age, or upon an uniform system, when any such children are excluded? It may be said that the constitution nowhere, in express terms, provides for the education of all children within certain ages. If so, then it nowhere provides for the education of any. If any are provided for, then all are. If all are not, then none are; and the legislature may divert from the education of youth between the ages of six and eighteen, and expend upon the entire community, or upon any portion it may see fit, the funds which it has been universally supposed were solemnly and irrevocably pledged to the former purpose. Of course this possible result does not prove any thing of itself; but its contemplation may serve to turn the otherwise unwilling mind to a natural construction of the constitutional language. If the reading suggested be the proper one, and I think it is, then the action of the legislature, in passing section 50 of the school law quoted, was unconstitutional; and the trustees erred when they conceived themselves bound thereby and acted thereunder, as the same was void.

My conclusion is that certain funds are pledged and certain taxation allowed for the support of common schools, which are public and open to be enjoyed by all resident children between the ages of six and eighteen years; subject, perhaps, to some qualification as before suggested. So it has been held in Massachusetts, under a constitution no more specific upon the subject than that of this State, and in Michigan under a statute similar to the one under consideration, minus its fiftieth section. *Roberts v. Boston*, 5 Cush. 198; *People v. The Board of Education of Detroit*, 18 Mich. 400. This general position is, however, to be taken subject to the very great powers of the trustees to arrange and classify the schools as they deem for the best interest of the scholars. While on the one hand they may not deny to any resident person of proper age an equal participation in the benefits of the common schools; and while in the present case, upon the facts presented, the defendants should

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have admitted the relator into the public school in question, yet, on the other hand, it is perfectly within their power to send all blacks to one school, and all whites to another; or, without multiplying words, to make such a classification, whether based on age, sex, race, or any other existent condition, as may seem to them best. *Van Camp v. Board of Education of Logan*, Y. O. S. 406; *Roberts v. Boston*, 5 Cush. 198.

Whether it be well or ill to classify or divide, on either or all of the conditions suggested, or upon any other, is entirely within the discretion of the trustees, acting intelligently within their powers. I think the mandamus should be ordered.

LEWIS, C. J., concurred in the result.

GARBER, J., delivered a dissenting opinion.

Mandamus granted.

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ACCEPTANCE.

See PAROL ACCEPTANCE.

ACCIDENT INSURANCE.

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ACCOUNT.

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ACTION.

1. A husband and wife commenced an action for a malicious replevin of their household furniture, alleging that the replevin suit was commenced with intent to injure the wife, and actually resulted in her injury by the removal of the furniture. It appeared that the replevin suit was still pending. *Held*, that the action could not be maintained. *O'Brien v. Barry*, 829.
2. An action cannot be maintained in the courts of Vermont, on a bond executed to a judge of probate in New Hampshire, to secure the proper discharge of the duties of a guardian, the duties imposed by the guardian's appointment, the obligation created by the bond, and the rights and remedies under it, being all prescribed by the statute of New Hampshire. *Judge of Probate, etc., v. Hubbard*, 894.
3. Where A has agreed to sell property to B, C may, at any time before the title has passed, induce A not to let B have the property, and to sell it to himself, provided he be guilty of no fraud or misrepresentation, without incurring any liability to B. In such a case A alone is liable to B for the breach of contract; and B cannot maintain an action against C for damages. *Ashley v. Dixon*, 559.

See BANKRUPTCY, 2; CONSPIRACY; PROMISSORY NOTE, 10; REAL ESTATE, 8

ACTS OF LEGISLATURE.

1. If a law has been regularly promulgated according to the forms of the constitution, its invalidity will not be examined or passed upon by the judiciary on alleged irregularities or informalities committed by the general assembly in passing it, nor will parol evidence be received to show that the general assembly have not complied with the requirements of the constitution in passing it. *The Louisiana State Lottery Co. v. Richoux*, 602. See 3 Am. Rep. 161.
2. An act of the general assembly will not be declared void because its objects are not set forth in its title, if the title discloses the objects of the act in terms so clear that no one can be misled thereby. *Id.*

ADJOINING PROPRIETORS.

See REAL ESTATE, 2.

ADMINISTRATORS.

See STATUTE OF LIMITATION, 2.

ADMIRALTY LAW.

A vessel of which defendant, a resident of New York city, was the nominal owner, was libeled in Buffalo, while in charge of J. S., the master and real owner, for a penalty incurred by carrying passengers without license. J. S., without defendant's knowledge, procured plaintiff to become bail for her release; and, on appeal from the decree enforcing the penalty, plaintiff became bail on the appeal bond, also. The decree was affirmed and paid by plaintiff, who brought action against defendant to recover the money so paid claiming as surety in the appeal bond. *Held*, that as the vessel was libeled in a home port, and within communicating distance with defendant, J. S. had no right to bind him; also, that plaintiff must be deemed to have made the payment as defendant in the decree, and not as surety on the appeal bond. *Gager v. Babcock*, 532.

See JURISDICTION, 2.

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See MASTER AND SERVANT; PRINCIPAL AND AGENT.

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ASSESSMENT.

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ASSESSMENT FOR LOCAL IMPROVEMENTS.

1. By the charter of the city of Louisville, the public ways of the city were placed under the exclusive control of the general council, with power to improve them by original construction and reconstruction. The charter

further provided that the improvements "shall be done as may be prescribed by ordinance, at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the general council, . . . payment to be enforced as other taxes, or by proceedings in court." *Held*, constitutional. *Broadway Baptist Church v. McAtee*, 480, and note, 487.

- 2 Under such a charter, church property is liable to be assessed for improvements, though exempted by general laws from taxation. *Id.*

See TAXATION.

ASSESSMENT OF CHURCH PROPERTY.

See ASSESSMENT FOR LOCAL IMPROVEMENTS, 2.

ASSESSMENT ON PREMIUM NOTE.

See INSURANCE, 5.

ASSIGNMENT.

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ATTACHMENT.

A, on the 1st of March, 1866, gave his negotiable promissory note to B, payable in two years. C, a creditor of B, served an attachment on A, as garnishee, in November, 1867. B indorsed the note February 23, 1868, to D, *bona fide* for value, D having no notice of the attachment, but having heard that B had failed. After maturity, A paid the amount of the note to D. *Held*, that the note was discharged, and that A was not liable under the attachment. *Day v. Zimmerman*, 157.

See EXEMPTION LAWS.

ATTESTING WITNESS.

See WILL, 8.

ATTORNEY.

1. One co-defendant may employ an attorney for the other co-defendants, and the appearance of such an attorney for all will bind all. If the attorney gives an unauthorized consent that judgment may be rendered against them, the remedy, if there is any other than that against the attorney, is by application directly to the court which rendered the judgment, or by writ of error, and not by *audita querela*. *Abbott v. Dutton*, 394.
2. It seems that an appearance by an attorney binds the party for whom he appears, whether the attorney was employed by the party or not. *Id.*

AUCTION.

The agency which an auctioneer assumes for a purchaser commences with the bidding and terminates at the close of the sale, and, unless the name of a purchaser is entered in the sale books at the time of the sale, the purchaser is not bound. *Walker v. Herring*, 616.

AUDITA QUERELA.

See ATTORNEY.

BAGGAGE.

See COMMON CARRIER, 4, 5, 7.

BAILEMENT.

Plaintiff sent his goods, in charge of G., to defendant's warehouse, for storage. G. put his name on the goods, and left a written notice with defendant not to give them up without his consent. Plaintiff then sent a written notice to defendant saying: "Please hold the same, subject only to my written order. The property is mine." Soon after, plaintiff demanded the goods of defendant, who refused to deliver them up, even after plaintiff had offered him a bond of indemnity, and to pay all charges. Subsequently a sheriff levied on the goods, under two executions against G., and, on the following day, an execution against plaintiff came into the sheriff's hands. The goods were sold on one of the executions against G., and the proceeds applied in payment thereof. *Held*, that defendant was liable for the value of the goods on the ground that he ought to have given up the goods on demand and offer of indemnity by plaintiff, or commenced a suit by bill of interpleader to determine the respective rights of plaintiff and G.; and that, as the goods were in fact plaintiff's, the levy and sale of them under an execution against G. did not mitigate the damages, notwithstanding the fact that the sheriff also held an execution against plaintiff, under which he did nothing. *Ball v. Liney*, 511.

BANK.

See FORGERY.

BANK CHECK.

The holder of a check, drawn by a third party on a bank, cannot offset such check against his note held by the bank. There is no privity of contract between the holder of such a check and the bank, and a refusal to pay the check would not give the holder a right of action against the bank. *Case v. Henderson*, 590.

See PRINCIPAL AND AGENT.

BANKRUPTCY.

1. To the plea that the plaintiff is a bankrupt, and that all his estate vested in his assignees, it is a good replication that the whole beneficial interest in the contract or demand in suit was vested, by prior assignment, in a third party, for whose benefit the suit is prosecuted. *Rhoades v. Blackiston*, 832.
2. In an action for an alleged breach of contract, it appeared that the plaintiff made the contract, in his own name, in the course of a business which he was carrying on for L., and which he had previously transferred to L. as security for a debt, with the agreement that L. should furnish all the capital, and receive all the profits, except enough to support plaintiff and his family, until the debt was paid, when the business and the profits should again become plaintiff's. After the alleged breach by defendant, plaintiff became bankrupt. *Held*, that plaintiff could maintain the action in his own name, and that his right of action did not pass to his assignees in bankruptcy. *Id.*
3. The omission of a petitioner in bankruptcy, under the act of 1867, to include a creditor's claim in his sworn schedule of debts, or to see that the creditor

has notice of the proceedings, must be shown to be willful and fraudulent in order to avoid the discharge. *Symonds v. Barnes*, 418.

4. Funds were paid into a State court for J. S., and other persons obtained judgments for costs against him, and execution was issued thereon, but returned unsatisfied. *Ordered*, that the amount of the costs be deducted from the funds, notwithstanding J. S. had been adjudged a bankrupt about the time the judgments for costs were obtained. *Clerk's Office v. The President, Directors and Company of the Bank of Cape Fear*, 508.

See EXEMPTION LAWS, 1, 2.

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BONDS.

See COUNTY BONDS.

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BREACH OF COVENANT.

Defendant conveyed to plaintiff, by deed of warranty, premises, a portion of which he had previously conveyed and given possession of to another. The premises were subject also to certain easements, such as a right of way, and the right to maintain a dam. *Held*, that the covenant of seisin, so far as it related to the portion previously conveyed, was broken at the date of the deed, and that the existence of the outstanding easements was a breach of the covenants of warranty. *Lamb v. Danforth*, 426.

See TENANTS IN COMMON, 8.

BREACH OF PROMISE OF MARRIAGE.

In an action by a woman for breach of a promise of marriage, *held*, that the action could be maintained although the defendant was married at the time of the promise, if the plaintiff was ignorant thereof; also, that evidence that plaintiff was seduced by defendant, under promise of marriage, was admissible in aggravation of damages. *Kelly v. Riley*, 836, and note, 838.

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See TAX COLLECTOR.

COMMON CARRIER.

1. Plaintiff shipped goods at Irvineton, Penn., to be transported to Boston by defendants, common carriers, and received a bill of lading containing a condition that "this merchandise may be carried in box cars, covered skeleton cars, or open platform cars; if destined beyond Philadelphia, it may be transported by water, in vessels, boats, barges or lighters, and if so destined to any point beyond, the same may be intrusted or delivered in the cars of this company, or otherwise, to any other railroad or transportation company or agent," etc. The usual route of defendants was by rail to Philadelphia, and thence by water to Boston. *Held*, that defendants were not bound to send the goods by rail from Philadelphia, when there was a temporary obstruction in the water communication. *Empire Transportation Co. v. Wallace*, 178.
2. Custom or usage will control the general law of liability of common carriers. *McMasters v. Pennsylvania R. R. Co.*, 264.
3. Defendants, a railroad company, delivered a barrel of sugar at a way station where they had no warehouse, but gave no notice to plaintiff, the consignee. It was proved that it was the custom for consignees, at that station, to be present to receive goods directed to them. *Held*, that a delivery on the platform was a good delivery under the custom. *Id.*

3. An express company received a package of money from a bank at T., to be transmitted to L., and in their receipt they undertook to "forward to the nearest place of destination reached by this company." By the conditions in the receipt, the company were not to be liable "except as forwarders only. * * * or for any default or negligence of any person or corporation to whom" the package should be delivered, "at any place of the established route run by this company," and such person or corporation was to be taken to be the agent of the consignor. To reach L., the package was carried by three other express companies, but the consignee at L. refused to receive it, and directed it to be returned to T., to which place it was carried by the same routes. On its arrival there, and return to the bank, it was found that part of the money had been abstracted. In an action by the bank against the express company at L., the judge charged that the company were bound by the contract to carry the package safely to L., and that the burden of proof was on the company to show how the loss occurred. *Held*, error, and that at most the defendant company were liable as carriers only to the end of their route, and beyond that only as forwarders; also, that the jury should have been instructed that, if the evidence satisfied them that the loss had not occurred on defendant company's route, either in going or returning, but on some other part of the route, and that, in the performance of their duties as forwarders, they had used reasonable diligence in the selection of proper carriers, defendant company were not liable. *American Express Company v. Second National Bank*, 268.
4. A leather bed, not intended for use on the voyage, is not "personal baggage" of a female passenger by steamship from Ireland to the United States. *Connolly v. Warren*, 800, and note, 803.
5. A gold watch, deposited in a trunk by a traveler on a railroad, is baggage, for the loss of which the carrier is liable. *American Contract Company v. Cross*, 471.
6. The inspection of the boilers, etc., of a vessel employed in the carriage of passengers, and the certificate of the inspector showing that they answer the requirements of the acts of congress of July 7, 1838, and August 30, 1852, do not *per se* constitute a defense to an action for an injury to a passenger. The acts of congress do not impair the common-law right of action by persons thus injured through the unskillfulness or negligence of the owner or master of a vessel. *Swarthout v. New Jersey Steamboat Co.*, 541.
7. A railroad passenger is not bound by a printed notice in his ticket, limiting the weight and value of his baggage, unless his attention is called to the notice, by the ticket agent, or unless he is aware of it when the ticket is purchased, in which case he will be presumed to have assented to the terms of the notice, in the absence of any objection on his part. *Ransom v. The Pennsylvania Railroad Co.*, 548.

See EXPRESS COMPANY; RAILROAD; WHARFAGE.

COMPROMISE.

See CONTRACT, 8.

CONCEALED WEAPONS.

See CONSTITUTIONAL LAW, 8.

CONDITION PRECEDENT.

See PROMISSORY NOTE, 4.

CONSEQUENTIAL DAMAGES.

See MALICIOUS PROSECUTION ; MUNICIPAL CORPORATION.

CONSIDERATION.

See CONTRACT, 1, 8.

CONSIGNEE.

See INSURANCE, 6.

CONSPIRACY.

A conspiracy to obtain from a master mechanic money, which he is under no legal obligation to pay, by inducing his workmen to leave him, and by deterring others from entering into his employment, or by threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the demand, is an illegal conspiracy; and the money thus obtained may be recovered back from the conspiring parties, who are, also, liable for all damages to the business of such mechanic occasioned by such illegal acts. *Carew v. Rutherford*, 287.

See RESTRAINT OF TRADE.

CONSTITUTIONAL LAW.

1. An act of the legislature authorizing a city to raise, by taxation of its citizens, the money for constructing a railroad leading into such city, from points within or without the State, when the railroad is deemed by a majority of the citizens to be essential to the interests of the city, is not unconstitutional. *Walker v. City of Cincinnati*, 24.
2. The legislature of Ohio authorized the judges of the superior court to appoint trustees of a contemplated railway. *Held*, (1) that this was not an exercise of the appointing power, forbidden to the legislature by article 2, section 27 of the State constitution, such trustees not being *public officers* in the constitutional sense, and their appointment by the court being a legitimate function; (2) that the act was not in violation of article 4, section 14 of the State constitution, prohibiting the judges from holding any other office, such power of appointment being only an additional power or duty annexed to an existing office and not a new office; and (3) the act was not in violation of article 2, section 20 of the State Constitution, in not fixing the term of office and compensation of the trustees, such trustees not being "officers" in the sense of the constitution. *Ib.*
3. An act of the legislature provided "that it shall not be lawful for any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver." *Held* constitutional, with the exception of the prohibition as to the "revolver." *Andrews v. State*, 8, and note, 22.
4. A sheriff paid the surplus of a sale on execution, to another than the person entitled thereto, by order of the military authorities in Missouri. In an

action on the sheriff's bond, *held*, that the section of the State constitution, providing that no person should be prosecuted for any act done in pursuance of military authority, was void, as impairing the obligation of contracts, in so far as it applied to acts done in violation of the sheriff's bond. *State v. Gatzweiler*, 119.

5. By a convention ordinance of Missouri, it was provided that an annual tax of ten and fifteen per cent of the gross earnings of the North Missouri R. R. Co. should be paid to the State in lieu of other taxation, and applied in payment of the debt due from the State, on the bonds issued to the company by the State. *Held*, not unconstitutional, either as in violation of articles 5 and 7 of the amendments to the United States Constitution (for these articles are only restrictive of federal power), or as impairing the obligation of contracts. Such an ordinance is a valid exercise of the taxing power. *North Missouri R. R. Co. v. Maguire*, 141.
6. The supreme court of Pennsylvania decided that under the laws, as to the opening of roads in Philadelphia, interest was to be allowed on an award from the date of the assessment. By the act of 1867, the legislature provided that the award should be enforced "in the same manner as provided by law in the opening of roads in the city of Philadelphia." By the act of 1869, the legislature declared that the true intent and meaning of the act of 1867 were "that no interest shall be allowed on damages for ground taken, up to the time of their payment on the issue of any warrant for their payment by the city of Philadelphia." In a case arising under the act of 1867, *held*, that the act of 1869, an expository act, was destitute of retroactive force, because it was an act of judicial power, and was in contravention of the constitution of the State, which declares that no man can be deprived of his property "unless by the judgment of his peers or the law of the land." *Haley v. City of Philadelphia*, 153, and note 156.
7. A grist-mill owned and operated by individuals who are compelled, by law, to grind well all grain received by them for that purpose, but are not compelled by law to receive grain for grinding, is not a "public" benefit in the constitutional sense; and an act of the legislature authorizing the flowage of lands (on payment of assessed damages), by maintaining a dam of sufficient height to run such mill, is an unconstitutional exercise of the right of eminent domain. *Tyler v. Beacher*, 398.
8. An act of the legislature of Illinois authorized the commitment to a "reform school" of children between six and sixteen years of age who are "vagrants or destitute of proper parental care, or are growing up in mendicancy, idleness or vice," to remain until reformed or until the age of twenty-one. On the application of the father of a child so committed, *held*, that the child must be discharged, the act being unconstitutional, and the commitment not being for any criminal offense. *People v. Turner*, 645.
9. The Nevada stamp act, requiring revenue stamps upon bills of exchange drawn in that State and payable in another State, is a valid exercise of the taxing power, and is not in conflict with the United States constitution. *Ex parte Martin*, 707.

See ACTS OF LEGISLATURE; ASSESSMENT FOR LOCAL IMPROVEMENT; EMINENT DOMAIN; JUDGMENT; MANDAMUS.

CONTRACT.

1. Defendant, an innkeeper, held goods of J. S. to satisfy his board bill. Plaintiff, also an innkeeper, was afterward applied to by J. S. for board, and agreed with defendant to board J. S. a certain time in consideration of defendant's promise to retain the goods as security for plaintiff's bill as well as his own. The goods were released without payment of plaintiff's bill. *Held*, that defendant's promise was founded on a good consideration, and that for the violation of it plaintiff was entitled to recover. *Hartzell v. Saunders*, 136.
2. In an action for work done and material furnished in fitting up a house, it is no defense that the work was done and material furnished with the knowledge, on the part of plaintiff, that defendant intended to use the house for gambling purposes. *Michael v. Bacon*, 138, and note, 140.
3. Defendants being unable to pay an undisputed liability of \$6,400, which they had incurred by breach of a contract with plaintiff, it was agreed that if defendants would borrow of their friends and pay \$3,500, and agree to pay an additional sum as soon as they were able, up to seventy-five cents on the dollar, plaintiff would compromise his claim. Defendants borrowed and paid the \$3,500, mainly in checks of their friends. *Held*, that this did not preclude plaintiff from suing for the residue of the claim, there being no consideration for the compromise. *Bunge v. Koop*, 546.
4. Services rendered a person during his last illness as nurse and housekeeper are not deemed to be gratuitous, but, on the contrary, there is an implied contract that the party receiving such services is to pay a fair compensation therefor. The fact, if it were shown, that the nurse or housekeeper lived with the man she was nursing and taking care of as his concubine does not impair or lessen her claim for wages, unless it be alleged and shown that concubinage was the motive and cause of their living together in the first instance, and the services rendered were merely incidental to that mode of living. *Succession of Pereuilhet*, 595.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION.

Defendant received bills of exchange for acceptance, and on demand for them by the persons entitled thereto, he looked for them, but not finding them said he might have burned them up with papers he considered of no value. *Held*, that he was not liable in trover, there being no evidence of a voluntary or intentional destruction or loss of the bills. *Salt Springs National Bank v. Wheeler*, 564.

See BAILMENT.

CONVEYANCE.

In an action for a breach of covenants in a warranty deed, it appeared that the deeds, after the usual words of conveyance and a description of the premises contained the words, 'and meaning hereby to convey * * * the same premises and title as conveyed to me by D. W., and no more.' It appeared also, that D. W. conveyed to defendant only an equity of redemption from a mortgage which was still outstanding at the date of the deed, and which

plaintiff was subsequently obliged to pay. *Held*, that the deed only conveyed an equity of redemption, and that the action could not be maintained. *Bates v. Foster*, 406

See BREACH OF COVENANT; DEED; ESTOPPEL.

CORPORATION.

A mining corporation was organized under a statute requiring the operations of the corporation to be carried on in Illinois. The corporation afterward engaged in mining in Colorado, and in the prosecution of its work borrowed large sums of money, for which notes of the corporation were given. *Held*, that a stockholder could not enjoin the collection of the notes, the doctrine of *ultra vires* not applying. *Bradley v. Ballard*, 656.

COSTS.

See JUDGMENT, 1.

CO-TENANTS.

See TENANTS IN COMMON.

COUNTY BONDS.

1. Where a statute authorizes the issue of county bonds after submitting certain questions to the people of the county to be voted upon, and the bonds are issued by the county, of its own motion, and without submitting the questions to the voters of the county, the bonds are void, even in the hands of *bona fide* holders; but the legislature has power to cure the defect by authorizing the county to take up the old bonds and issue, in lieu thereof new bonds, which would be valid. *Steines v. Franklin County*, 87, and note 100.
5. Where county bonds are, by act of the legislature, authorized to be issued upon a popular vote "specifying the amount," and the bonds are issued upon a popular vote which failed to "specify the amount," this circumstance will be deemed an irregularity simply, and not sufficient to render the bonds void in the hands of *bona fide* holders. *State of Missouri ex rel. Neal v. Saline County Court*, 108.

COVENANT RUNNING WITH THE LAND.

See REAL ESTATE, 1.

CRIMINAL LAW.

1. An indictment contained two counts: The first charged the defendant with breaking and entering a store-house; the second charged him with stealing the goods. He was found guilty under both counts, and the judge imposed a distinct sentence on each count. *Held*, not erroneous. *Commonwealth v. Birdsall*, 388.
2. The voluntary drunkenness of a murderer neither excuses the crime nor mitigates the punishment. The rule is, that one in a state of voluntary intoxication is subject to the same rule of conduct, and to the same rules and principles of law, that a sober man is; and that where a provocation is offered, and the one offering it is killed, if it mitigates the offense of the

man drunk, it should also mitigate the offense of the man sober. *Shannon v. Commonwealth*, 485.

3. On an indictment for murder, where the plea of self-defense was relied upon, the jury were instructed that "by the term malice aforethought, is meant a predetermination to kill, however suddenly or recently formed in the minds of the person killing, before the fatal act, so that the determination actually exists in the mind before and at the time of the killing, and be not prompted alone by the first transport of passion and under great provocation." *Held*, error, on the ground that the instructions under the plea of self-defense was in effect a determination by the court that killing in necessary self-defense may be killing with malice aforethought, and, therefore, legally murder. A killing, to constitute murder, must be done unlawfully, and unless it be unlawful, it cannot have been done with malice aforethought, although it may have been predetermined. *Bohannon v. Commonwealth*, 474.
4. Where one's life has been repeatedly threatened by an enemy, a desperate and lawless man, an actual attempt been made to assassinate him, and the members of his family been informed by such enemy that he is to be killed on sight, he may lawfully arm himself to resist the threatened attack; he may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose, and if, on such occasion, he casually meets his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man, and the circumstances attending the meeting, he has reason to believe that the presence of his enemy puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed. *Id.*

See CONSTITUTIONAL LAW, 8, 8; HUSBAND AND WIFE, 8; LABOURY; WITNESS, 3, 4.

CUSTOM.

See COMMON CARRIER, 2.

DAMAGES.

See BREACH OF PROMISE OF MARRIAGE; CONSPIRACY; MALICIOUS PROSECUTION; MASTER AND SERVANT, 8; NEGLIGENCE; RAILROAD, 4.

DECLARATORY STATUTE.

See CONSTITUTIONAL LAW, 6.

DEED.

In a deed of land, the description by lot should prevail over that by bearings and distances. Where the language conveying premises was: "Lot No. 3, in block 87, in the old town of Hudson, now Macon, beginning at the north-east corner; thence west to the alley, . . . to the beginning," the description actually embracing a less area than lot 3, *held*, that all of lot 3 was conveyed. *Rutherford v. Tracy*, 104.

See CONVEYANCE.

DEFENSE.

See PROMISSORY NOTE, 1, 4, 7.

DELIVERY.

See COMMON CARRIER.

DESCRIPTION,

See DEED · WILL, 5.

DOMESTIC JUDGMENTS.

See JUDGMENT, 2, 3.

DOWER.

See HUSBAND AND WIFE.

DRAWEE.

See FORGED CHECK.

DRAWEE AND PAYEE.

See BANK CHECK.

DRUGGIST.

See NEGLIGENCE.

DRUNKENNESS.

See CRIMINAL LAW, 2; PROMISSORY NOTE, 7.

EASEMENT.

See BREACH OF COVENANT.

ECCLESIASTICAL LAW.

1. The title and use of the property of a divided congregation, and the offices pertaining thereto, belong to that portion which adheres to the denomination and conforms to its rules. *Roshi's appeal*, 275, and note, 233.
2. A classis of the German Reformed church of the United States, sitting as an ecclesiastical court, declared certain offices held by defendants vacant. *Held*, that this decision was binding on the civil courts. *Id*.

EDUCATION.

See MANDAMUS.

EMINENT DOMAIN.

1. A State legislature may delegate the right of eminent domain to an agent of the United States for the purpose of obtaining land in such State as a site for a post-office. *Burt v. Merchants' Insurance Co.*, 339.
2. By an act of the legislature of Massachusetts, an agent of the United States was authorized to purchase land in the State for the site of a post-office. The act provided that, when the agent and the owners of the land could not agree

upon the price, there should be an appraisalment made by a jury. *Held*, that in order to obtain the land and the appraisalment, it was not necessary that the owner should first *consent* to a sale. *Id.*

See CONSTITUTIONAL LAW, 7.

ESTOPPEL.

1. If a grantor shows the purchaser of premises the wrong lines, and is cognizant of his acting on that information, and is silent while a house is erected and money expended, he will be deemed to have directly led the purchaser into a line of conduct prejudicial to his interest. Such acts would constitute an estoppel *in pais*. *Rutherford v. Tracy*, 104.
2. Defendant, having an equitable interest in one half of a lot of land, was present when the lot was offered for sale at auction, but gave no notice of his claim and entered the list of bidders. *Held*, that he was estopped from afterward asserting his title against the purchaser. *Rice v. Bunce*, 129.

See HUSBAND AND WIFE ; RECEIPT IN FULL.

EVICTIION.

See LANDLORD AND TENANT.

EVIDENCE.

1. After a non-professional witness has stated the facts upon which his opinion is founded, he may be permitted to state his opinion as to the sanity or insanity of a testator. *Pidcock v. Potter*, 181, and note, 184.
2. There is no presumption of law that a letter, mailed to one at the place he usually receives his letters, was received by him. Proof that money was inclosed by the postmaster at M., in an envelope directed to the cashier of a bank at B., and then inclosed in a registered envelope directed to the postmaster of B., and deposited in the mail bag for the post-office at B., is not sufficient to justify a jury in finding that the bank received the money. *First National Bank of Bellefonte v. McManigle*, 283.

See ACTS OF LEGISLATURE ; BREACH OF PROMISE OF MARRIAGE ; PROMISSORY NOTE, 1, 6, 18 ; WILL ; WITNESS.

EXEMPTION LAWS.

1. Plaintiff, having two pairs of oxen, sold one pair to L., who took them away on condition that they were to become his when he paid for them. *Held*, that the pair remaining were the *only* pair of oxen plaintiff then owned, and as such were exempt from attachment, and being so exempt, would not pass to the assignee in bankruptcy of plaintiff. *Wilkinson v. Wait*, 391.
2. Defendant, a constable, attached property of plaintiff by law exempt from attachment, and subsequently surrendered it under protest to the assignee in bankruptcy of plaintiff. *Held*, that the assignee, having no right to take the property, defendant was liable in trover. *Id.*
3. An execution was issued on a judgment in favor of the State in an action on a sheriff's bond. *Held*, that the judgment debtors' homesteads were not exempt under the homestead law. *Commonwealth v. Cook*, 456.
4. Exemption laws do not apply to the State unless by express words in the enactment. *Id.*

EXPERT.

See EVIDENCE.

EXPRESS COMPANY.

An express company received at Chicago a package of bank bills marked, according to the receipt, "Bank of Dalton, Georgia, for redemption, which we undertake to forward to Dalton, perils of navigation excepted; and it is hereby expressly agreed that" this company "are not to be held liable for a loss or damage except as forwarders only." The company's line terminated in New York. *Held*, that it was not the company's duty to carry the package to Dalton, present it at the bank for redemption, and receive and return the proceeds, or, if not redeemed, to return the package; but that it was the company's duty simply to carry the package to New York and place it in the hands of a connecting company. *Reed v. The United States Express Co.*, 561.

See COMMON CARRIER.

EXTRINSIC EVIDENCE.

See ACT OF LEGISLATURE; PRINCIPAL AND AGENT, 2; PROMISSORY NOTE, 16, 18; WILL.

FALSE REPRESENTATION.

See INSURANCE, 8, 8.

FIRE INSURANCE.

See INSURANCE.

FLOWAGE ACTS.

See CONSTITUTIONAL LAW, 7.

FOREIGN INSURANCE COMPANY.

See INSURANCE COMPANY, 12.

FOREIGN JUDGMENT.

See JUDGMENT, 2, 8.

FORGED CHECK.

1. The payee of a forged check, drawn payable to his order, took it from a third person, without inquiry, although in good faith and for value, and indorsed it for collection; and the drawee paid it. *Held*, that the drawee could recover the amount so paid from the payee. *National Bank of North America v. Bangs*, 849, and note, 853.
2. The responsibility of the drawee, who pays a forged check, for the genuineness of the drawer's signature, is absolute only in favor of one who has not, by his own fault or negligence, contributed to the success of the fraud or to mislead the drawee. *Ib.*

FORGERY.

In this case, the evidence shows that plaintiff kept a bank account with defendant; that the book-keeper of plaintiff kept the cash account, made the deposits, etc., and that his relations toward the plaintiff were well understood in the bank; that the book-keeper of plaintiff drew a check on the bank for \$2,500, to which he forged plaintiff's signature, which was an amount above the account to the credit of plaintiff in the bank; that notice was given by the bank that plaintiff had overdrawn his account, who, on being shown the check for \$2,500, said he had not signed it, but did not say that it was a forgery. On seeing his book-keeper, he reported back to the bank that it was all right. Subsequently the book-keeper drew another check on the bank for \$1,700, and again forged the signature of the plaintiff thereto, which the bank paid on presentation. On discovering the second forgery by the book-keeper, six months after the first, plaintiff denounced the act. *Held*, that the act of the plaintiff, in ratifying the first act of forgery made by his book-keeper, exonerated the bank from all liability for having paid it; that his afterward keeping the book-keeper in his confidential employ misled the bank and threw it off its guard; that, having approved and ratified the first forgery, the bank was excused for paying subsequent checks similarly drawn; that the plaintiff had by his own acts caused the injury, and he must therefore bear the loss. *De Foriet v. Bank of America*, 597.

FORWARDERS.

See EXPRESS COMPANY.

FRAUD.

See INSURANCE, 8, 8; PARTNERSHIP, 5; STATUTE OF FRAUDS.

FRAUDULENT SALE.

See SALE.

GARNISHMENT.

See ATTACHMENT.

GRANTOR AND GRANTEE.

See ESTOPPEL.

GUARANTY.

Defendant wrote to the president of plaintiff bank, "I will thank you to submit to your board that if they will lend O'Neil & Co. \$15,000, I shall hold myself responsible for that amount, and will leave with you, as collateral security, the note and mortgage of Isaac Walker, which is at present in your vault for a like sum." *Held*, a guaranty, and that defendant was entitled to notice of acceptance thereof; but if, after the loan was made, defendant had information thereof, and with full knowledge approved of what plaintiff had done in the premises, and assented thereto, this would amount to a ratification, and he would be bound thereby. *Central Savings Bank v. Shine*, 112.

See PROMISSORY NOTE, 6.

GUARDIAN'S BOND.

See ACTION, 2.

HIGHWAY.

1. The owner of land appropriated to a highway retains his exclusive right in trees and shrubs growing on the land so appropriated, for every purpose not incompatible with the public right of way, and he may maintain an action against an individual who, not acting under statutory or official authority, destroys or removes the trees and shrubs standing or growing in the highway, unless they constitute an obstruction, hindrance or annoyance to travelers. *Phifer v. Cox*, 58, and note 63.
2. In an action against a municipal corporation for damages, resulting from the giving way of a bridge in consequence of latent defects, it appeared that the duty to repair was imposed upon the corporation by statute. *Held*, that as the latent defect causing the injury could have been detected by proper and careful examination, by skilled persons employed by the authorities, the corporation was liable. *Rapho and West Hempfield Townships v. Moore*, 202, and note 205.
3. The owner of a building so near the street, and of such shape and character that snow and ice collected upon the roof, in the natural course of things, falls down upon the sidewalk, and thereby injures a passer using due care, is liable for the injury; and this is so, notwithstanding the rooms in the building are occupied by tenants, he having access to and control of the roof. *Shipley v. Fifty Associates*, 818.
4. Defendant suspended a sign over a street in Boston, in violation of a public ordinance of the city. During an extraordinary gale the sign was blown down, and a bolt, part of the fastenings, was hurled against plaintiff's window, causing damage, for which action was brought. *Held*, that defendant was liable, notwithstanding due care was exercised in constructing and fastening the sign. *Salisbury v. Herchenroder*, 354, and note 355.
5. Defendant's wife, under the direction of the highway surveyor, cut the grass growing in the highway over the land of plaintiff, that her children might go and come from school, without getting their clothes wet. She carried the grass away, when cut, and fed it to her husband's horse. *Held*, that although she had a right to cut the grass, yet, by carrying it away, she became a trespasser *ab initio*. *Cole v. Drew and wife*, 363.
6. The owner of the soil over which a highway is located, is entitled to emblements growing thereon, and to the entire use of the land, except the right which the public have to use the land and the materials thereon for the purpose of building and maintaining a highway suitable for the safe passage of travelers. *Id.*
7. A town is not liable to a private action for injuries sustained by a traveler in consequence of neglect to repair a highway. *Town of Waltham v. Kemper*, 652.

See MUNICIPAL CORPORATIONS, 1, 3; SUNDAY; TAXATION.

HOMESTEAD.

See EXEMPTION LAWS.

INDEX.

HOMICIDE.

See CRIMINAL LAW.

HUSBAND AND WIFE.

1. Real estate, intended for the wife, was conveyed to the husband, the wife paying part of the consideration. *Held*, that an equitable estate *pro tanto* vested in the wife; and that she was not estopped from asserting her estate against one seeking to subject it to the execution of a judgment on a loan made to her husband after the conveyance, on his personal credit, the loan not being induced or influenced by her conduct. *McGovern v. Knox*, 80.
2. On the trial of an indictment against a wife for selling intoxicating liquors the judge was requested to charge the jury "that if any of the sales were made by the wife in the presence of her husband, she would be presumed to act under the coercion, compulsion or direction of her husband, and would not be liable for such sales." The request was refused. *Held*, correct. *State v. Cleaves*, 423.
3. Before the act of 1868-69 of the legislature of North Carolina, a widow was entitled to dower in such lands only as the husband should die seized of. By this act the law of dower was changed so as to give the widow dower in all lands of which the husband was seized during coverture. *Held*, that this act did not prevent a husband, married before the act, from selling lands also owned before the act; and that an agreement to pay the wife a certain sum for her right of dower, on such sale, was void against creditors for want of consideration. *Sutton v. Askew*, 500.

ILLEGAL CONTRACT.

See CONTRACT, 2; RESTRAINT OF TRADE.

IMMORAL CONTRACT.

See CONTRACT, 2.

INCUMBRANCE.

See TAXES.

INDIRECT DAMAGES.

See MUNICIPAL CORPORATION.

INDORSEMENT.

See PROMISSORY NOTE.

INFANT.

See CONSTITUTIONAL LAW, 8; MASTER AND SERVANT, 5.

INJUNCTION.

See CORPORATION; WHARFAGE.

INN KEEPER.

See CONTRACT.

INSANITY.

See EVIDENCE; TESTAMENTARY CAPACITY.

INSOLVENCY.

See SALE.

INSPECTION OF BOILERS.

See COMMON CARRIER, 6.

INSURABLE INTEREST.

See INSURANCE, 6.

INSURANCE.

ACCIDENT.

1. An accident insurance policy was issued containing stipulation that the insurance should not embrace any "death caused by" natural disease, surgical operation, unreasonable imprudence." While the insured, who used to be a farmer, was pitching hay in the field of a relative whom he was visiting, the handle of the pitchfork slipped through his hands and struck him in the bowels, inflicting an injury which produced peritoneal inflammation, in consequence of which he died. *Held*, that this was a case of death resulting from an injury occasioned by "accident." *The North American Life and Accident Insurance Co. v. Burroughs*, 212, and note, 218.
2. Where a policy does not require that the preliminary proof shall give the mode and manner of death, but merely proof of the injury, and that the death was occasioned by such accidental injury, *held*, that the plaintiff may recover, although the preliminary proofs unwittingly ascribe the injury to a wrong cause. *Id.*

FIRE.

3. A person in possession of premises, under a contract of purchase, having paid only part of the purchase-money, the rest not being due, obtained a policy of fire insurance on the premises, and in his written application, which was made a part of the policy, answered the questions propounded as follows: Question. "Is the property owned and operated by the applicant?" Answer. "Yes." Question. "Is any other person interested in the property—if so, state the interest?" Answer. "No." Question. "Incumbrance—is there any on the property?" Answer. "Held by contract." *Held*, that the answers were substantially true, and that the policy was not avoided for false representations. *Lorillard Fire Ins. Co. v. McCulloch*, 52.
4. A fire insurance company issued a policy of insurance on the goods of its agent who, on the day of its receipt, made an entry in his book of accounts with the company of the amount chargeable against him for the premium. He forwarded no letter of acceptance nor any part of the premium, inasmuch as it was not the custom to forward remittances pertaining to his agency until the end of the month. The next day the goods were destroyed by fire, whereupon he immediately announced the loss to the company. *Held*, that the company was liable on the policy. *Lungstrass v. German Insurance Co.*, 100.

5. In an action by a mutual fire insurance company for the amount of an assessment upon a premium note, *held*, that proof of a resolution of the company's board of directors, levying the assessment to meet the indebtedness of the company, was insufficient to establish the liability on the note, without further proof that the losses and expenses which authorized the assessment had actually occurred. *Pacific Mutual Insurance Co. v. Guse*, 182, and note, 185.
6. In an action on a policy of insurance, the petition alleged that the plaintiffs, being the owners of a quantity of ice, consigned it to S. & K. to be sold by them on commission; that plaintiffs ordered the consignees to have the ice insured, which they agreed to do, but, instead of insuring it in the names of plaintiffs, they made the insurance in their own names; that a portion of the ice was lost by a peril provided against, and the consignees assigned the policy to plaintiffs. Defendants demurred, on the ground that the consignees had no insurable interest in the ice, and the demurrer was sustained. *Held*, error, because when a consignee accepts a consignment, with instructions from his principal to insure for their benefit, it becomes his duty to insure, and if he neglects to do so, and a loss occurs, he is liable. *Shaw v. Aetna Insurance Co.*, 150, and note, 151.
7. A policy of fire insurance was indorsed with the following condition: "The basis of this contract is the application of the insured, and if such application does not truly describe the property this policy shall be null and void." The application concluded as follows: "And the said applicant hereby covenants and decrees . . . that, the foregoing is a just, full and true exposition of . . . the condition, situation and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk." In an action on the policy, *held*, that the application was a part of the contract, and in the nature of a warranty or condition precedent; also, that it was necessary for the plaintiff to set out the application in his complaint, and aver and prove the observance of the warranty or condition. *Bobbitt v. The Liverpool and London and Globe Insurance Company*, 494.
8. A representation in an application for a policy of fire insurance need not be both fraudulent and false to vitiate the insurance; it is sufficient that the representation be false. *Ib.*
9. Defendant issued to plaintiff a policy of fire insurance on goods "contained in the first story of the five-story brick building situated at No. 39 Centre street." Subsequently plaintiff moved his goods up stairs, and the agent of defendant received the renewed premium with knowledge of the change in location of the goods, giving a receipt in the words "On stock . . . 39 Centre street," etc. A loss by fire having occurred while the goods were located up stairs, *held*, that plaintiff could recover. *Ludwig v. The Jersey City Insurance Co.*, 556.
10. The provision in a policy of insurance against an increase of risk by acts of the insured is an independent condition of itself, and is not to be controlled or limited by the previous conditions or specifications of the hazards. Therefore, an act done by the assured, although not included in the class of specified hazards, nevertheless avoids the policy if it increases the risk. *Dittmer & Pelle v. Germania Insurance Company of New Orleans*, 600.

11. In this case the assured allowed a lot of loose and unbaled hay to be stored in the upper part of the building insured, without giving notice to the insurers. *Held*, that, although unbaled hay was not specially excepted from the hazards, yet, from its very nature, the risk was increased, and, therefore, it availed the policy on that ground. *Id.*
12. A foreign insurance company cannot, without first complying with the laws of Illinois enacted for their regulation, make contracts which it may enforce; and where the company fails to file the statement of its condition and the consent of the auditor to transact business within the State, as required by law, the company cannot recover on a note given in such State, for stock and premiums, notwithstanding the law imposes a penalty for doing business in such State, in violation of its provisions. *The Cincinnati Mutual Health Assurance Co. v. Rosenthal*, 626.

LIFE.

13. A policy of life insurance upon the life of W. contained a condition prohibiting the insured from going south of a specified degree of latitude, and from entering into any "military or naval service whatever." At the time of issuing the policy, the company, in consideration of a further premium, gave W. a written permission to go south of the specified degree of latitude for one year, provided that the "said W. was not insured by said policy against death from any of the casualties or consequences of war or rebellion, or from belligerent forces in any place where he may be." The insured, while engaged, within the year, in building a railroad bridge, under the direction of the United States military authorities, thirty miles in the rear of the Union army, was killed by a party of four men, not in uniform, who robbed the other laborers. *Held*, that the death of the insured did not occur while engaged in "military service," or from the "casualties of war or rebellion," within the meaning of the policy, and that the company was liable. *Wells v. Connecticut Mutual Life Insurance Co.*, 518.
14. An application was made to the agent of defendant for a policy of insurance on the life of plaintiff's husband, the applicant paying \$50, according to the rules of defendant, to be applied on the first year's premium, if the insurance should be effected. The application was forwarded to defendant's office, and a policy was made out and sent to the agent for delivery; but the insured having died two days after the policy was issued but before its delivery, the agent refused to deliver it, although the balance of the premium was offered to be paid. *Held*, that the policy had attached. *Cooper v. Pacific Mutual Insurance Company of California*, 705.

MARINE.

15. In an action on a policy of marine insurance on a vessel, effected April 9, 1866, "for one year from March 14, 1866, at noon," it appeared that the agent of the company, for receiving and forwarding applications in his letter of April 9, stated that the vessel "was at Gibraltar" March 14. *Held*, that the statement of her whereabouts was immaterial. *Vigoreaux v. Lime Rock Insurance Co.*, 428.
16. Under a time policy of marine insurance, it is immaterial where the vessel may be at the inception or termination of the risk. *Id.*

17. A policy of insurance was issued on a vessel undergoing repairs in New York "at and from New York to Havana." On the completion of the repairs, the vessel went on a trial trip to Elizabethport, sixteen miles distant, and to take in coal. She returned to New York, and sailed thence to Havana. *Held*, a deviation so as to avoid the policy. *Fernandes v. The Great Western Insurance Co.*, 571.
18. An insured vessel was sailing toward a prohibited port with the intention of entering, when she was lost at sea. *Held*, that the policy was not avoided. *Snow v. The Columbian Insurance Co.*, 578.
19. A warranty not to use a certain port means not to go into it; an intention to use a prohibited port does not violate the policy. *Id.*

JOINT AND SEVERAL NOTE.

See PROMISSORY NOTE, 3.

JUDGMENT.

1. In an action on a promissory note, payable in gold or silver, the judgment, in case of recovery, must be for coin to the amount found due on the note and interest. The judgment for costs must be general, so that it may be satisfied by payments of either kind of lawful money. *Phillips v. Dugan*, 66.
2. The courts of the State in which a judgment of a court of another State is sought to be enforced have a right to inquire how far the judgment presented may be conclusive in the State in which it was rendered. And in determining this question the courts of this State will require that the whole record of the proceedings be produced under which the judgment was obtained, in order to show how far it may be conclusive. *McLaren & Co. v. Kahler*, 591.
3. If a judgment of the inferior jurisdiction of another State has been appealed and the supreme court has pronounced a final judgment thereon, and the judgment or demand passed upon is sought to be enforced in this State, the record or proceedings of the supreme court, being the final judgment in the cause, is the proper transcript to present to enable the courts of this State to ascertain how far it is conclusive in the State where it was rendered. *Id.*

JURISDICTION.

1. The unexercised jurisdiction of the United States courts over a question does not oust a State court of jurisdiction when the question arises collaterally by way of a defense to an action in which the State has jurisdiction of the parties and the subject-matter. *Wilkinson v. Wait*, 391.
2. A proceeding by attachment or provisional seizure, when taken out against a vessel belonging to a port of one State, while lying in a port of another State, to enforce a claim for repairs and materials furnished at the latter port, is a proceeding *in rem* or in admiralty, and the State courts are without jurisdiction, notwithstanding an act of the legislature authorizing such a proceeding. But in such a case, where the master has also been personally cited and is sought to be made liable in his individual capacity, the State courts, although without jurisdiction to proceed *in rem* by provisional seizure,

are, have jurisdiction of personal action. *Southern Dry Dock Co. v. Steamboat J. D. Perry, Captain Baird and Owners*, 585.

LANDLORD AND TENANT.

1. A landlord erected, without the tenant's consent, a new building in the back yard, against the demised house, whereby two of the rooms, previously used as kitchen and bedroom, were made unfit for those purposes, and were, by reason of that unfitness, abandoned by the tenant. *Held* an eviction, so as to effect a suspension of the rent. *Royce v. Guggenheim*, 332.
2. When a tenancy has been legally terminated, the landlord may enter peaceably upon the premises; and, having so entered, he may remove the tenant therefrom, using such force as would sustain a plea of *molitor manus impossuit*, and he may remove the tenant's goods if the tenant, after sufficient opportunity, neglects to do so, using due care and caution in their removal, and depositing them in a near and convenient place. And if, under such circumstances, the landlord bursts open a door, which the wife of the tenant has wrongfully fastened, removes the doors and windows, which make it uncomfortable for her to remain, and brings a dog into the house which, by barking, annoys her, such acts do not constitute an assault. Acts which embarrass and distress do not constitute, although they may aggravate an assault. *Stearns and wife v. Sampson*, 442.

See HIGHWAY, 2.

LARCENY.

On an indictment for larceny it appeared that the prisoner and S., who were confederates, met the prosecutor; S. dropped a piece of paper; prisoner picked it up while S. had stepped aside and took from it a five cent coin; S., on returning, received the paper from prisoner, saying that "he would not take ten dollars" for it, and proceeded to bet that there was a five cent coin in it; prosecutor bet his watch, and the stakes were placed in prisoner's hands, whereupon S. tore open the paper, exhibited a five cent coin, which had been concealed therein, snatched the watch and walked off. *Held*, larceny. *Defress v. State*, 1.

LATERAL SUPPORT.

See MUNICIPAL CORPORATION.

LAWS.

See ACTS OF LEGISLATURE.

LAWS OF OTHER STATES.

See ACTION, 2. *

LEASE.

See REAL ESTATE.

LEGAL TENDER ACT.

In 1870 the legislature of Vermont authorized the State treasurer to pay, in gold coin, bonds issued before the passage of the "legal tender" act of congress

and due in 1871. Subsequently, the supreme court of the United States decided that the legal tender act applied to debts contracted before as well as after its passage; and the State treasurer refused to pay the bonds in gold coin. *Held*, that the payment of the bonds in gold could not be enforced. *Kellogg v. Page*, 388.

LEGISLATIVE POWER.

See CONSTITUTIONAL LAW, 6.

LIEN.

See TAXES; UNITED STATES TAX LIEN.

LIFE INSURANCE.

See INSURANCE.

LIGHTING STREET.

See MUNICIPAL CORPORATION, 3.

LIMITATION OF ACTION.

See STATUTE OF LIMITATIONS.

LORD'S DAY.

See SUNDAY.

LOST NOTE.

See PROMISSORY NOTE, 10, 11.

MAILING LETTERS.

See EVIDENCE, 2.

MALICE AFORETHOUGHT.

See CRIMINAL LAW.

MALICIOUS PROSECUTION.

An action for maliciously suing out a writ of attachment will lie, notwithstanding a bond given in the attachment suit, conditioned to pay all damages arising from the attachment; and in such an action the plaintiff is entitled to recover the consequential damages of the attachment to his business, credit and reputation, together with the counsel fees and expenses incident to the defense of the attachment suit. *Lawrence v. Hagerman*, 674.

• See ACTION, 1.

MANDAMUS.

A mandamus will lie compelling trustees to admit colored persons to the public schools, where separate schools are not provided for such persons. *State v. Duffy*, 718.

See RAILROAD 3, 5; REMOVAL OF CAUSE, 2.

MARINE INSURANCE.

See INSURANCE.

MARITIME LAW.

See ADMIRALTY LAW; JURISDICTION.

MARRIAGE.

See BREACH OF PROMISE OF MARRIAGE.

MARRIED WOMEN.

A married woman may sue in her own name under the statutes of New York, for injuries to her paraphernalia given to her by her husband. *Benson v. The Pennsylvania Railroad Co.*, 543.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. J. S., the agent of defendants, was traveling for them under no particular orders as to the mode of travel he should adopt. At W., without disclosing his principals, he hired of plaintiffs, who were livery-stable keepers, a team and buggy. At St. M., while the horses were standing in front of a store in which J. S. was transacting business as agent for defendants, the horses took fright and broke the bridle by which they were hitched, but were caught before any damage was done. The horses were then tied by a halter, which was fastened around the neck of the near horse. J. S. took the broken bridle to a shop to be repaired, and after finishing his business at the store he undertook to lead the team to the shop by the halter around the neck of the near horse. On the way one of the buggy wheels struck a stone, thereby causing some paper boxes to be thrown out of the buggy and frightening the horses, and J. S. not being able to hold them by the halter, they broke away and caused damage to the buggy, harness, and to one of the horses, for which action was brought. *Held*, that J. S. was negligent; and that defendants were responsible for the damages resulting from his negligence. *Pickens v. Diecker*, 55.
2. Plaintiff and wife were rightfully seated as passengers in one of the cars of defendant, a common carrier of passengers. By the procurement and order of the conductor, they were forcibly ejected therefrom, and thus received injuries for which action was brought. *Held*, that defendant was liable, notwithstanding the willfulness or wrongful motive of the conductor in doing the act complained of. *Passenger Railroad Co. v. Young*, 78, and note, 80.
3. A master is bound to use due care and diligence in the selection and employment of his agents and servants, and for want of such care and diligence he is responsible to all other servants for any damage that may thence arise. *Moss v. Pacific Railroad*, 126, and note 128.
4. A minor son of plaintiff was killed while in defendant's employ, and she brought action to recover damages. *Held*, that it was not sufficient for plaintiff to allege a failure merely, on defendant's part, to select competent servants, but she should have charged a want of care and diligence in the selection of defendant's servants; also that the mere allegation that defendant

allowed its employees to neglect their duties, and to suffer and cause deceased to be injured, was not sufficient to charge liability on defendant. *Id.*

5. At a station where defendants' train of cars had stopped, the engine, tender and one car ran down to the water-tank in charge of the fireman, who asked a boy ten years old, standing there, to put in the hose and turn on the water. While the boy was climbing upon the tender to comply with the request, some detached cars belonging to the train came down with ordinary force, and struck the car next to the tender, whereby the boy was thrown down and crushed to death. In an action by the parents of the boy, *held*, that the defendants were not liable. *Flower and Wife v. The Pennsylvania R. R. Co.*, 251.
6. Plaintiff was a passenger on the steamboat of defendants, common carriers, when the steward and some of the table waiters wrongfully assaulted and injured him. *Held*, that defendants were liable. *Bryant v. Rich*, 811, and note, 816.
7. A passenger upon defendants' boat was assaulted and injured by an officer of the boat. *Held*, that defendants were liable. *Shorley v. Billings*, 451, and note, 456.
8. A brakeman on a railroad, in the discharge of his duty, while descending a defective ladder on a freight car, fell, and was crushed by the engine, so that amputation of his legs was necessary. *Held*, that the company was liable unless the brakeman was negligent, or unless he knew, or might have known of the defect in the ladder, which was a question for the jury; but that \$18,000 was excessive damages, because, after deducting expenses, this sum, at interest, would produce, annually, more than the brakeman could have expected to earn, had he not been disabled. *The Chicago & Northwestern Railway Co. v. Jackson*, 661.

See RESPONDEAT SUPERIOR.

MEASURE OF DAMAGES.

See RAILROAD, 4.

MENTAL UNSOUNDNESS.

See TESTAMENTARY CAPACITY.

MILITARY AUTHORITY.

See CONSTITUTIONAL LAW, 4; WAR.

MISDESCRIPTION IN WILL.

See WILL, 5.

MUNICIPAL CORPORATION.

1. Defendant, a municipal corporation, constructed, in a lawful and careful manner, a sewer, by making the excavation for which the lateral support to plaintiff's house was withdrawn, so that the foundation walls gave way. *Held*, that defendant was not liable in damages. *City of Cincinnati v. Penny*, 78.
2. By an act of the legislature, a city was empowered to make a sufficient number of reservoirs "to supply water in case of fire." Under this act a

reservoir was constructed, but was afterward partially destroyed a the city, so that when a fire occurred on plaintiff's premises, near by, there was no water in the reservoir to extinguish it. In an action against the city for damages, *held*, that plaintiff could not recover, on the ground that it was discretionary with the city to construct or maintain the reservoir. *Grant v. City of Erie*, 272, and note 275.

- 3 Cities and towns are under no obligation to light highways at night. *Randall v. Eastern Railroad Co.*, 837.

See HIGHWAY, 2, 7.

MUNICIPAL TAXATION.

See CONSTITUTIONAL LAW, 1.

MURDER.

See CRIMINAL LAW.

MUTUAL INSURANCE COMPANY.

See INSURANCE, 5.

NAVIGABLE STREAM.

See RIPARIAN RIGHTS.

NEGLIGENCE.

1. Defendant, an apothecary, by his servant, negligently sold, as and for the use of rhubarb, two ounces of laudanum to P., who procured it for the purpose of administering it, and who did administer it, as a medicine to his servant, the plaintiff's intestate, from the effects of which he died. *Held*, that defendant was liable in damages to plaintiff, the administratrix. *Norton v. Sewall*, 298, and note 299.
2. Plaintiff's intestate was killed in alighting from defendant's railway train, while moving at the rate of from two to four miles per hour. It appeared that the conductor went with the intestate, who was a passenger, out on the platform, to assist him to alight. *Held*, that "if the intestate, without any direction from the conductor, voluntarily incurred danger by jumping off the train while in motion, the plaintiff was not entitled to recover; but if the motion of the train was so slow that the danger of jumping off would not be apparent to a reasonable person, and the intestate acted under the instructions of the conductor, then the resulting injury was not caused by contributory negligence or want of care." *Lambeth, administrator v. North Carolina R. R. Co.*, 508.

See HIGHWAY; MASTER AND SERVANT; RAILROAD.

NEGOTIABLE PAPER.

See FORGED CHECK; PROMISSORY NOTE.

NOTICE OF ACCEPTANCE.

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INDEX.

NOVATION OF CONTRACT.

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OFFICERS.

See CONSTITUTIONAL LAW, 2; PUBLIC OFFICER.

OFFICIAL BOND.

See ACTION, 2.

OPINION.

See EVIDENCE.

PARAPHERNALIA.

See MARRIED WOMEN.

PARENT AND CHILD.

See CONSTITUTIONAL LAW, 8.

PAROL ACCEPTANCE.

Defendants, having a note for collection, received an order from the owner requesting them to pay a portion of the proceeds when collected to plaintiffs. The order having been accepted by parol, defendants subsequently transferred the note to C., to whom it was paid. *Held*, that the parol acceptance was binding, and that defendants were liable to plaintiffs for the amount of the order. *Phelps v. Northrup*, 681.

PAROL EVIDENCE.

See ACTS OF LEGISLATURE; PRINCIPAL AND AGENT, 2; PROMISSORY NOTE, 1, 6, 18; WILL.

PAROL PROMISE.

See PAROL ACCEPTANCE.

PARTNERSHIP.

1. A partner who neglects and refuses, without reasonable cause, to perform personal services which he has stipulated to render the partnership, is liable to account to the firm for the value of the services in the settlement of the partnership accounts. *Marsh's Appeal*, 206, and note 212.
2. Where several persons entered into articles of agreement, forming a partnership, and one of the partners, by verbal agreement, assumed to render certain services which he neglected to perform; *held*, that he was chargeable with the value of his services on the settlement of the firm accounts. *Id.*
3. Real estate was purchased by G. S. and J. G. in their individual names. Subsequently, they formed a partnership with J. S., under the name of G. S. & Co. The cash payment, on account of purchase-money of the real

- estate and the first installment, were paid before J. S. became a partner. He acquiesced in the subsequent appropriation of the firm funds to the payment of the balance, and to expenditures made in improvements, knowing that it stood in the individual names of G. S. and J. G. It was agreed by parol that G. S. was to have one-third of the real estate as soon as there was a final settlement. *Held*, that there was no resulting trust for the partnership, and the real estate having been sold under execution, the fund arising from the sale should go to the individual creditors of G. S. and J. G., instead of the creditors of the firm. *Lefevre's Appeal*, 239.
4. Two partners cannot maintain a joint action of account against a third, to recover their share of the net profits received by him, in the absence of an independent promise or of an adjustment of the partnership matters. *Furror v. Pearson*, 439.
5. A partner made his promissory note and indorsed it in the firm name without his copartner's knowledge or consent, in payment of an individual debt to defendant, who took the note with knowledge of the facts, and in order to bind the firm, indorsed it before maturity to a *bona fide* holder for value. The note was paid out of the firm assets. *Held*, that defendant was guilty of a fraud for which he was liable in damages; but that the fraud was not upon the firm, but upon the individual partners, who did not consent to the indorsement of the note, and that the cause of the action against defendant did not pass to plaintiffs by a general assignment of the assets of the firm, or by a conveyance to plaintiffs of the firm interest of a partner injured by the fraud. *Calkins v. Smith*, 575.

PASSENGER CARRIER.

See COMMON CARRIER; MASTER AND SERVANT, 2, 6, 7; RAILROAD.

PAYMENT.

See PROMISSORY NOTE, 9, 12.

PERSONAL BAGGAGE.

See COMMON CARRIER, 4, 5, 7.

PLEADING.

See MASTER AND SERVANT, 4.

POISON.

See NEGLIGENCE.

PREMIUM NOTE.

See INSURANCE, 5.

PRINCIPAL AND AGENT.

1. A bank check, with the words "Ætna Mills" printed on the margin, was given in payment of a debt due from the mills, and signed by F., the treasurer. *Held*, that it was the check of the mills, and not the personal check of F. *Carpenter v. Farnsworth*, 360, and note, 369.

2. A promissory note in the form: "I promise to pay to the order of S. & Co.," etc., and signed "John T. Hull, Treas. St. Paul's Parish," is the note of Hull, and parol evidence is inadmissible to show that it was the understanding of the parties when the note was given that it was the note of the parish and not of Hull. *Sturdivant v. Hull*, 409, and note, 415.

See BANKRUPTCY, 2; MASTER AND SERVANT.

PRINCIPAL AND SURETY.

See SURETY.

PRIVITY.

See ACTION, 3; BANK CHECK.

PROMISSORY NOTE.

1. In an action on a promissory note, brought by the indorsee against the indorsers, the defense was that plaintiff, for C. & E., the makers of the note, paid the amount of it to defendants, the holders, and that after such payment, and after the note had been delivered to plaintiff for C. & E., defendants, at plaintiff's request, indorsed it, with the express understanding that the indorsement was to be used by plaintiff only as evidence to C. & E. that he had paid the note. *Held*, that parol proof of this defense was admissible. *Morris v. Faurot*, 45.
2. A promissory note in the form, "I promise," etc., and signed by several parties as makers, is joint as well as several. *Wallace v. Jewell*, 48, and note, 52.
3. Adding the name of a person as maker of a joint and several promissory note after delivery, without the knowledge or consent of the original signers, is a material alteration, and vitiates the note as to such original signers. *Id.*
4. In an action on a lost promissory note, the defense was that defendant had given \$300 and a new note to plaintiff in satisfaction of the lost note. In reply to this defense, plaintiff alleged that he had been induced to accept the \$300 and the new note by defendant's fraudulent representations. The judge ruled that plaintiff could not recover unless he had, before bringing his suit, offered to return the new note and the \$300. *Held* error, and that it was sufficient that the new note be brought into court ready to be given up or canceled on the trial; also, that the \$300 need not be produced at all, as it was paid upon the lost note. *Miller v. Woods*, 71.
5. A promissory note, not bearing interest, was signed by the principal maker and by the sureties, and delivered to the payee. Two months afterward, the payee, without fraudulent intent, and the sureties not being present, but by consent of the principal maker, added the words, "Int. payable semi-annually." In an action on the note by the payee, *held*, that the alteration avoided it as to the sureties, and that, after going to trial, the payee could not be permitted to strike out the added words, and recover on the note in its original form. *Fulmer v. Seitz*, 172, and note, 175.
6. Defendant put his name on the back of a negotiable promissory note, the payee not having indorsed it, and subsequently wrote letters to the payee stating that if the maker did not pay the note he (defendant) would pay it. In an action by the payee, *held*, that although, in the absence of legal evi

- dence, the position of defendant was that of second indorser, yet the letters were admissible in evidence to prove that the agreement upon which the indorsement was made was a guaranty that the note should be paid to the payee. *Eilbert v. Finkbeiner*, 178, and note, 178.
7. The drunkenness of the maker of a negotiable promissory note cannot be set up as a defense against an innocent holder for value. The indorsee will be deemed an *innocent* holder unless he took the note *mala fide*, and with notice of the condition of the maker. *State Bank v. McCoy*, 248, and note, 251.
 8. Defendant was surety on a promissory note payable to plaintiff. In drafting the note, the plaintiff's given name was, through a mistake, incorrectly written. After the note was executed, plaintiff, with the consent of the maker, but without the knowledge or consent of defendant, corrected the payee's name. *Held*, not to be a material alteration. *Derby v. Thrall*, 389, and note, 390.
 9. A promissory note payable at a bank was presented for payment by the holder at eleven o'clock on the day it was due, but it was not then paid. The maker, between eleven and twelve o'clock of the same day, put funds in the bank, and gave instructions to have the note paid on presentation. After that it was not presented again, although it was the custom to allow until three o'clock for payment of such notes. The maker subsequently withdrew the funds from the bank. In an action by the holder against the maker, *held*, that the maker was liable, and the money not having been brought into court, the holder was entitled to judgment with costs. *Hills v. Place*, 568.
 10. An action at law will not lie on a lost negotiable promissory note. *Moses v. Trice*, 609.
 11. Defendant proposed to pay his note to plaintiff, but at plaintiff's request the note was renewed, upon the understanding that it should be deposited in bank for collection. Subsequently defendant deposited in his own name the amount of the note in the bank, which was burned, with the contents, before the note had matured or been deposited. *Held*, that defendant was liable for the amount of the note. *Id.*
 12. A promissory note given for a debt does not operate as an extinguishment or payment of the debt, unless it be so accepted by the creditor, and a note in renewal is but a continuation of the debt, and if it is not paid at maturity, the creditor may sue upon it, or upon the original cause of action. *Id.*
 13. In an action by the payee against the maker of a promissory note, absolute on its face; *held*, that parol evidence was inadmissible to show that it was conditional. *Walker v. Crawford*, 701.

See ATTACHMENT; JUDGMENT; PRINCIPAL AND AGENT; SURETY.

PROXIMATE AND REMOTE CAUSE.

See MUNICIPAL CORPORATION.

PUBLIC OFFICER.

1. A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. *State v. Stanley*, 488.

2. An act providing for the appointment of a director for the State in all corporations in which the State is a stockholder creates an office, and the person so to be appointed is a public officer. *Id.*

See CONSTITUTIONAL LAW, 2.

RAILROAD.

1. A regulation by a railway company, restricting the holder of a certain class of tickets to special trains, nothing of the kind appearing on the tickets, will not justify the expulsion of the holder of such a ticket from the regular trains, he having taken passage thereon without knowledge of the regulation. *Maroney v. Old Colony and Newport Railway Company*, 805.
2. A railroad company negligently left their depot platform in a defective condition. A hackman, while carrying a passenger to the depot for transportation, stepped, without fault, into a cavity in the platform, and was injured. *Held*, that the company was liable, and the liability was the same, notwithstanding the platform was within the limits of the highway. *Tobin v. Portland, Saco and Portland R. R. Co.*, 415, and note 417.
3. A railroad company refused to receive freight at a way station, to be delivered at an elevator five hundred feet beyond their terminus, on a track owned by another company, but which they had sometimes used for delivery at the elevator. *Held*, that a writ of *mandamus* would not lie compelling the company to receive freight for such delivery. *The People v. The Chicago and Alton R. R. Co.*, 681.
4. A railroad company set apart in its passenger trains a car for the exclusive use of ladies, and gentlemen accompanied by ladies. A colored woman was excluded from the car on account of her color. *Held*, that the company was liable in damages, and that \$300 was not excessive in view of the indignity and delay of the exclusion. *Chicago and North Western Railway Co. v. Williams*, 641.
5. Although a railway company cannot be compelled to deliver freight beyond its own line, simply because there are connecting tracks over which it might pass by paying track service, but which it has never made a part of its own line, yet a writ of *mandamus* will lie compelling the company to deliver at an elevator situated upon tracks operated in common with other companies, notwithstanding the delivery may be at an additional expense, and the company may have contracted with other elevators for exclusive delivery to them. *Chicago and North Western Railway Co. v. The People ex rel. Hempstead*, 696.

See COMMON CARRIER; MASTER AND SERVANT; NEGLIGENCE; RESPONDENT SUPERIOR.

RATIFICATION.

See GUARANTY.

RATIFICATION OF FORGERY.

See FORGERY.

REAL ESTATE.

1. A lease of premises contained covenants to the effect that, upon the payment of \$500, the rent should cease and the premises be conveyed to the lessee; that the rent should be paid semi-annually, in April and October, and that if the lessee neglected to build a house and make repairs as covenanted, or neglected to pay rent, the lessor should have the right to enter upon the premises and take possession thereof. The lessee assigned his interest and the assignee went into possession, but neither the lessee nor assignee fulfilled the covenant to build and repair. The rent was paid for four years; in the fifth year the October rent was accepted, but in January following, the lessor entered upon and took possession of the premises, complaining that the building and repairs had not been made as covenanted. In March, the orator, administrator of the assignee who died intestate, tendered the lessor \$500, with the semi-annual rent due the following month, and demanded a conveyance of the premises. The lessor had conveyed the premises to G. a few days previous, and refused to comply with the orator's demand. *Held*, that the covenant to convey, contained in the lease, ran with the land, and was assignable; that the lessor had waived his right to enter and take possession, until the right of the assignee had become valuable; that, if there were any forfeiture, the tender of payment of the \$500, and the accruing rent saved it; and that as G., the grantee, stood in no better position than the lessor, a decree should be entered for a conveyance of the premises to the orator. *Hagar v. Buck*, 368.
2. The owner of land overhung by the branches of a fruit tree, standing wholly on the land of an adjoining owner, is not entitled to any of the fruit growing thereon. *Hoffman v. Armstrong*, 537.
3. A vendor, in consideration of the prompt payment of a sum of money, agreed to sell lands on condition that, in case of the failure of the vendee in the performance of all or either of the covenants on his part, the vendor should have the right to declare the contract void, and take immediate possession of the premises. In the construction of this contract, *held*, that where the vendee enters upon the performance of the contract, and, paying part of the purchase-money, makes default which is inexcusable, and the vendor, being without fault, exercises the right given by the contract of declaring the same terminated, and in doing so acts fairly and within the scope of the power, then no action can be maintained by the vendee to recover back what he has paid; but a vendor who is himself in fault for fraud or violation of his contract cannot exercise the power so given without making restoration of what he has received under it. In such case the law would imply a promise to repay the purchase-money received, and an action for money had and received would lie. *Wheeler v. Mather*, 683.

See CONVEYANCE; DEED.

REBELLION.

See WAR.

RECEIPT IN FULL.

Under a contract for the delivery of hides, plaintiff was to receive a bonus on each hide delivered. At each delivery defendant paid the value of the

hides, and received a receipt from plaintiff expressed to be *in full*. The *bonus* was not paid. *Held*, that plaintiff could recover the *bonus*, notwithstanding the receipts. *Ryan v. Ward*, 589.

RESCISSION.

See REAL ESTATE, 2.

REGISTERED LETTERS.

See EVIDENCE, 2.

RELIGIOUS SOCIETIES.

See ECCLESIASTICAL LAW.

REMOVAL OF CAUSE.

1. An action had been prosecuted to judgment in a State court, the verdict had not been set aside, the exceptions taken at the trial had been overruled by the court of last resort, and the only question remaining for disposal was upon a motion for new trial on the ground of excessive damages in the verdict. *Held*, that it was too late to obtain a removal of the cause to the United States circuit court, under act of congress of 1867, ch. 196. *Bryant v. Rich*, 811, and note 816.
2. The application of a party to remove a cause to the circuit court of the United States is analogous to a plea to the jurisdiction of the State court, and, when granted, the party against whom it is taken has the right to appeal. The case would be different if the application to remove is refused. In the latter case no irreparable injury would follow, and the appeal would not be allowed. *State v. The Judge of the Thirteenth Judicial District*, 688.
3. A mandamus will therefore issue, on application, from the supreme court directing the judge of the district court to grant an appeal from an order transferring a cause to the circuit court of the United States, if the case is in other respects, appealable. *Id.*
4. Where a citizen of one State commences an action against a citizen of another State in the courts of the latter State, the plaintiff is, nevertheless, entitled, afterward, to have the cause removed to the United States courts, under act of congress of March 3, 1867. The affidavits in such a case need not set forth the facts on which the applicant for the transfer bases his belief that local prejudice exists; it is sufficient if they state that he has reason to, and does, believe that such local prejudice exists, as will prevent his obtaining justice. *Meadow Valley Mining Co. v. Dodds*, 709.

RESPONDEAT SUPERIOR.

A railroad company employed a contractor to construct, "under the general supervision of the chief engineer of the company," a portion of its road; and the sub-contractors and their employees committed various trespasses and injuries on the lands of plaintiffs. *Held*, that the company, not having directed the acts complained of, nor having any control over the persons who committed them, and the injuries not being the natural result of the work contracted to be done, plaintiff could not recover of the company; notwithstanding the statutes provided that the company should be liable "for tree

passes and injuries to lands and buildings adjoining, or in the vicinity of its road, committed by a person in its employ or occasioned by its order." The statutory provision does not embrace the acts of contractors. *Eaton v. European & Northern Railway Co.*, 430.

RESTRAINT OF TRADE.

Five coal corporations of Pennsylvania entered into an agreement, in New York, by which they agreed to divide the market for the bituminous coal, from the two coal regions of which they had control, in certain proportions; to appoint a committee to take charge of the business of all the corporations, and to appoint a general sales-agent, to be stationed at Watkins, New York. By the agreement, it was further provided, that each company was to deliver its proportion of the coal at such times and to such parties as the committee should, from time to time, direct; that the committee should adjust the prices of coal in the different markets; that the general agent should direct a suspension of shipment or delivery of coal by any of the companies making sales or deliveries beyond its proportion. By a statute of New York, "If two or more persons shall conspire to commit any act injurious . . . to trade or commerce, they shall be deemed guilty of a misdemeanor." In an action on a draft, given in furtherance of this agreement, *held*, that the agreement was in contravention of the statute and against public policy, and, therefore, illegal and void; also, that the draft was tainted with the illegality, and could not be recovered upon. *Morris Run Coal Co. v. Barclay Coal Co.*, 159.

RESULTING TRUST.

See PARTNERSHIP, 3.

REVENUE TAX.

See SALE.

REVOCATION.

See WILL, 2.

RIGHT TO BEAR ARMS.

See CONSTITUTIONAL LAW, 3.

RIPARIAN RIGHTS.

1. The owners of land, on opposite sides of a stream, agreed by covenant, running with the land, jointly to erect a dam, each to have the use of half of the water. The title to the land passed by various intermediate conveyances to plaintiff on one side of the stream, and defendant on the other. *Held*, that an action on the case would lie by plaintiff against defendant for using more than half of the water. In such a case, nothing less than an absolute denial of the right to one-half the water, followed by an enjoyment inconsistent with its existence for a period of twenty-one years or more, can amount to an extinguishment of it. *Lindeman v. Lindsey*, 319.
2. A stream capable of being commonly and generally useful for floating boats, rafts or logs for any useful purpose is subject to the public use as a passage way. *Weiss v. Smith*, 621.

8. Defendant, in using a stream for floating logs, attached a boom to plaintiff's land. In an action for damages, the judge instructed the jury that, if the stream was adapted to floating logs, and a boom was necessary for that purpose, the plaintiff's right was subrogated to a reasonable use by the public. *Held* correct. *Id.*

SABBATH.

See SUNDAY.

SALE.

1. Goods were sold and delivered by plaintiff to defendant. In an action to recover the contract price, *held*, that the fact that plaintiff was a wholesale dealer, and, during the time when the goods were sold, had not paid the special tax imposed by act of congress of 1864, chapter 173, section 79, did not invalidate the sales or prevent a recovery. *Larned v. Andrews*, 846.
2. The sale upon credit, at a fair price, to a responsible vendee, of the entire effects of an insolvent copartnership, is not *per se* fraudulent as to creditors, although the vendee has knowledge of the insolvency. There is a distinction in this respect between a sale and an assignment. In the case of a sale there is a consideration passing to the vendor from the vendee, who becomes the owner of the property in his own right; and the vendor, while parting with the property, obtains the purchase-money, which, whether paid in cash or in notes, is liable to the claims of creditors, and can be reached by an appropriate action. And, although such a sale may be made on the part of the vendor with the intent to "hinder, delay or defraud his creditors," the title of the vendee is not affected thereby, unless he had previous notice or knowledge of the fraudulent intention of the vendor. *Bull v. Phillips*, 533.

See AUCTION; REAL ESTATE.

SALE AND DELIVERY.

See STOPPAGE IN TRANSITU.

SCHOOL.

See MANDAMUS.

SEDUCTION.

See BREACH OF PROMISE OF MARRIAGE.

SELF-DEFENSE.

See CRIMINAL LAW.

SENTENCE.

See CRIMINAL LAW.

SERVANT.

See MASTER AND SERVANT.

SERVICES.

See CONTRACT, 4.

SIGN.

See HIGHWAY, 4.

SPECIFIC PERFORMANCE.

A parent made a parol promise to convey land to his child, whereupon the child took possession and made extensive and valuable improvements. *Held*, after the death of the parent, specific performance could be enforced. *Kurtz v. Hibner*, 665.

STATE BONDS.

See LEGAL TENDER ACT.

STATE STAMP ACT.

See CONSTITUTIONAL LAW, 2.

STATUTES.

See ACTS OF LEGISLATURE.

STATUTE OF FRAUDS.

1. The mortgagee of part of a vessel promised persons who had furnished her with supplies, for which they had no lien on her, to pay the debt if they would not attach the interest of the other part owners. *Held*, that the promise was within the statute of frauds. *Ames v. Foster*, 848.
2. The statute of frauds applies to an oral contract for the sale of goods in existence at the time of making the contract, but not to an agreement to manufacture and deliver goods. *Parsons v. Loucks*, 517.
3. Defendant made an oral agreement to manufacture and deliver a quantity of paper to plaintiff. In an action for breach of the contract, *held*, that the agreement was valid, notwithstanding the statute of frauds. *Ib*.
4. It was orally agreed among three parties — a creditor, a debtor and a promisor — that if the debtor would pay the amount of the claim, in money and notes to the promisor, the promisor would pay the claim of the creditor in plated ware, and the creditor should release the debtor. In pursuance of this agreement, the promisor executed a written undertaking to the creditor to furnish the plate; the creditor, at the same time, executed a written agreement to give his claim against the debtor to the promisor, on the delivery of the plate, and about the same time the creditor released the debtor. The promisor delivered a portion of the plate; and in an action by the creditor against the promisor, for the value of the balance of the plate, *held*, that there had been a substitution of debtors, and the oral promise was not within the statute of frauds; also that the creditor was not bound to assign the claim to the promisor as a condition precedent to the delivery of the plate, or to the beginning of an action for the non-delivery. *The Meriden Britannia Co. v. Zinsgen*, 549.
5. An agreement was entered into between W. and H., to purchase property jointly at auction. In pursuance thereof, W. bid off the property, and in the auctioneer's memorandum the name of W. was written as purchaser. On the following day a partner of W. added the name of H. as purchaser in the memorandum, without the direction of H., who refused to fulfill his part of

the agreement. A loss having occurred by a resale, in an action by W against H., to recover his share of the loss, *held*, that the agreement was within the statute of frauds; that the memorandum did not take it out of the statute, and that H. was not liable. *Walker v. Herring*, 616.

See AUCTION; PAROL ACCEPTANCE.

STATUTE OF LIMITATION.

1. A sheriff paid the surplus of a sale on execution to another than the person entitled thereto, by order of the military authorities in Missouri. In an action on the sheriff's bond, *held*, that as the action was not commenced until after the lapse of two years from the time when the return showing the sale was made, it was barred by the statute of limitations, as enacted by congress in 12 Statute at Large, 757, which was applicable alike to causes in the federal and in the State courts. *State of Missouri v. Grutsweiler*, 119.
2. Where one of two joint administrators has an account against his intestate which was barred by the statute of limitations before the death of the intestate, the bar will not be removed, and the debt revived by the statement or admission of his co-administrator that the account is correct. *Seig v. Acord's Executor*, 605.

STOPPAGE IN TRANSITU.

B. & Co., of New York, sold on credit, and consigned in the ordinary way to "Geo. T. Hull, Youngstown, Ohio, A. & G. W. R. R.," goods which arrived at the Youngstown station and were transferred by the railroad company's agent to its freight depot, where they awaited payment of charges as a condition precedent to their removal by draymen to Hull's place of business. On the evening of the day of the arrival of the goods they were seized in attachment at the suit of creditors of Hull. *Held*, that B. & Co. might assert the right of *stoppage in transitu*. *Oulahan v. Babcock*, 68.

STREET.

See HIGHWAY; MUNICIPAL CORPORATION, &c.

STRIKE.

See CONSPIRACY.

SUNDAY.

Plaintiff was traveling from A. to L., a distance of eight miles, on Sunday, to visit his two boys, when he was injured by insufficiency in the highway. In an action against the town, *held*, that a recovery would not be defeated by statute prohibiting travel on Sunday, except for attendance at places of moral instruction and from necessity. *McClary v. Lowell*, 394, and note 397.

SURETY.

The mere omission by the holder of a promissory note to present it to the assignee (for benefit of creditors) of the principal will not discharge the surety. *Dye v. Dye*, 40.

See PROMISSORY NOTE.

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SURETYSHIP.

See GUARANTY.

TAXATION.

The legislature has no authority to compel the owners of farm lands, lying within one mile on each side of a public highway, to pay for grading, macadamising and improving it, by an assessment upon their lands by the acre. *Washington Avenue*, 255.

TAXATION IN AID OF RAILROADS.

See CONSTITUTIONAL LAW, 1.

TAX-COLLECTOR.

A tax-collector, whose statutory duty was, after selling a distress, to deduct the tax and expense of sale, and restore the balance to the former owner, applied a portion of the proceeds in payment of a tax already paid, and of illegal charges, before returning the balance. *Held*, an abuse of authority which rendered him a trespasser *ab initio*. *Carter v. Allen*, 420.

TAXES.

Taxes were assessed on land May 1; the tax bill was issued to the collector October 1. *Held*, that the taxes were an incumbrance on the land from May 1. *Cochran v. Guild*, 296 and notes 297.

TAXING POWER.

See CONSTITUTIONAL LAW, 5.

TAX LIEN.

See UNITED STATES TAX LIEN.

TELEGRAPH COMPANY.

Conditions in telegraphic messages as to repeating are reasonable; and where a person writes a dispatch and signs his name upon a blank containing a printed condition that the company will not be responsible for the correct transmission of a message unless it is repeated at an additional expense, he cannot recover for an error in transmission, the condition as to repeating not being complied with, and there being no allegation of gross negligence or willful misconduct on the part of the company. *Bross v. United States Telegraph Co.*, 536 and note 532.

TENANTS IN COMMON.

1. Plaintiff and B. were tenants in common of land, plaintiff being in occupation. Defendant bought standing grass of plaintiff, to be paid for when cut and harvested. *Held*, that defendant could not avoid paying plaintiff the contract price, when due, on the ground that B. forbade payment. *Brown v. Wellington*, 530.
2. Where one of two tenants in common enters upon the joint premises and constructs a race-course, which he uses exclusively, and cuts and takes away

wood designated to be left growing upon the premises, he is liable as bailee to account to his co-tenant for the use of the race-course and for one-half of the wood. *Hayden v. Merrill*, 872.

2. Tenants in common have several freeholds, and are not obliged to join in an action against their grantor for a breach of the covenants of warranty in his deed. *Lamb v. Donforth*, 496.

TESTAMENTARY CAPACITY.

Partial unsoundness of mind not affecting the general faculties, and not operating on the mind of a testator, in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will. *Pidcock v. Potter*, 181 and note 184.

TIME POLICY.

See INSURANCE, 16.

TOWN.

See HIGHWAY, 7.

TRADE.

See RESTRAINT OF TRADE.

TRADE-MARK.

Plaintiff had, for many years, manufactured and sold a steel pen, put up in boxes, with "808" and "Joseph Gillott, extra fine," upon the pens and boxes. Defendant began the manufacture and sale of a steel pen, put up in boxes with "808," and "Esterbrook & Co., extra fine," upon the pens and boxes. *Held*, that plaintiff had acquired the right to the exclusive use of the figures "808" as a trade-mark; and that an action would lie restraining defendants from using such figures in such manner. *Gillott v. Esterbrook*, 553.

TRADES UNION.

See CONSPIRACY.

TRANSFER OF CAUSE.

See REMOVAL OF CAUSE.

TREES OVERHANGING.

See REAL ESTATE, 2.

TRESPASS.

See HIGHWAY, 5.

TRESPASSER.

See TAX COLLECTOR.

TRUST.

See PARTNERSHIP, 2.

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ULTRA VIRES.

See CORPORATION.

UNDUE INFLUENCE.

See WILL, 2.

UNITED STATES COURTS.

See JURISDICTION.

UNITED STATES STATUTES.

See COMMON CARRIER, 6.

UNITED STATES TAX LIEN.

The fixtures and furniture of the tenant of a distillery, upon which the United States had a lien, were sold under an execution issued on a judgment obtained against him by a creditor in a State court. *Held*, that the property was not sold subject to the lien, but that the lien was to be first discharged. The lien of the United States on the proceeds is superior to that of the judgment creditor or of the landlord for rent. *Dugan's Appeal*, 100.

USAGE.

See COMMON CARRIER, 2.

USAGE OF WAR.

See WAR.

VENDOR AND VENDER.

See REAL ESTATE.

VERBAL AGREEMENTS.

See STATUTE OF FRAUD.

WAR.

A United States provost marshal seized personal property of plaintiff and sold it at public auction. Subsequently plaintiff found a horse, part of the property sold, in the possession of defendant, and brought an action for its recovery. The court ruled that plaintiff must prosecute his remedy, if any, against the government, and that defendant was not liable in this action. *Held*, error, and that in order to protect his title under the sale, the defendant must show that the property was seized and sold in accordance with the usages of war. *Bowles v. Lewis*, 85.

3. A citizen or corporation in one country or section of country at war with another is responsible for the unauthorized appropriation of an enemy's private property, whether the possession be acquired by a mere trespass or through the form of a purchase under an illegal judgment of a court. *Louisville & Nashville R. R. Co. v. Buckner*, 462.

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WARRANTY.

See BREACH OF COVENANT; INSURANCE, 7, 12.

WATER PRIVILEGE.

See RIPARIAN RIGHTS.

WAY.

See HIGHWAY.

WEAPONS.

See CONSTITUTIONAL LAW, 2.

WHARFAGE.

Plaintiff was accustomed to ship coal by defendants' railroad for transportation beyond their line upon the Delaware river. Defendants had also allowed plaintiff, for a certain consideration, to use their wharf at the river terminus of the railroad; but, subsequently, there not being room for all the shippers they denied plaintiff the wharf facilities, while they allowed others to use the wharf. *Held*, that although transportation by defendants, common carriers, was necessarily open to the public without discrimination, yet wharfage was within the discretion of defendants, and a mandatory injunction would not lie compelling them to allow wharfage facilities to plaintiff as well as others. *Audens Reid v. Philadelphia & Reading Railroad Co.*, 198.

WILL.

1. The unlawful cohabitation of a testator with the mother of an illegitimate child, a legatee in the will, is not of itself sufficient evidence to justify a jury in finding undue influence on the part of the mother.
2. Where a second will is found to be invalid, with the exception of the clause of revocation, on the ground of undue influence, the cause of revocation alone is not sufficient evidence of the testator's intention to revoke a former will. The presumption is that, if the second will is found to be invalid, the testator intended that the first will should stand, rather than that he should die intestate. *Rudy v. Ulrich*, 238.
3. A wife is not a competent witness to a will containing a devise to her husband. *Sullivan v. Sullivan*, 356.
4. By statute it was provided that "all beneficial devises made in any will to a subscribing witness thereto shall be wholly void, unless there are three other competent witnesses to the same." A wife was one of the three subscribing witnesses to a will containing a devise to her husband. It was contended that the devise to her husband was a "beneficial devise" to the wife, and, therefore, void, leaving her a competent attesting witness to the rest of the will. *Held*, that the contention could not be maintained, and there not being the required number of competent witnesses required by law, the will was invalid. *Id.*
5. By a will, land in "section thirty-two" was devised to E., and land in "section thirty-one" was devised to J. *Held*, that parol evidence was inadmissible to show that the draughtsman of the will made a mistake, or that

"section thirty-two" should be section thirty-three, and "section thirty-one" should be section thirty-two. *Kurtz v. Hübner*, 685, and note 689.

See TESTAMENTARY CAPACITY.

WITNESS.

On the trial of an indictment against a wife for being a common seller of intoxicating liquors, the judge charged the jury "that the fact that defendant did not go upon the stand to testify, was a proper matter to be taken into consideration in determining the question of her guilt or innocence *Hold, correct. State v. Olweiss*, 422.

See EVIDENCE; WILL.

WORDS.

"*Accident*," see INSURANCE, 1.

"*Appointing Power*," see CONSTITUTIONAL LAW, 2.

"*Beneficial Device*," see WILL, 4.

"*Casualties of War*," see INSURANCE, 12.

"*Military Service*," see INSURANCE, 12.

"*Officers*," see CONSTITUTIONAL LAW, 2.

"*Personal Baggage*," see COMMON CARRIER, 4, 5.

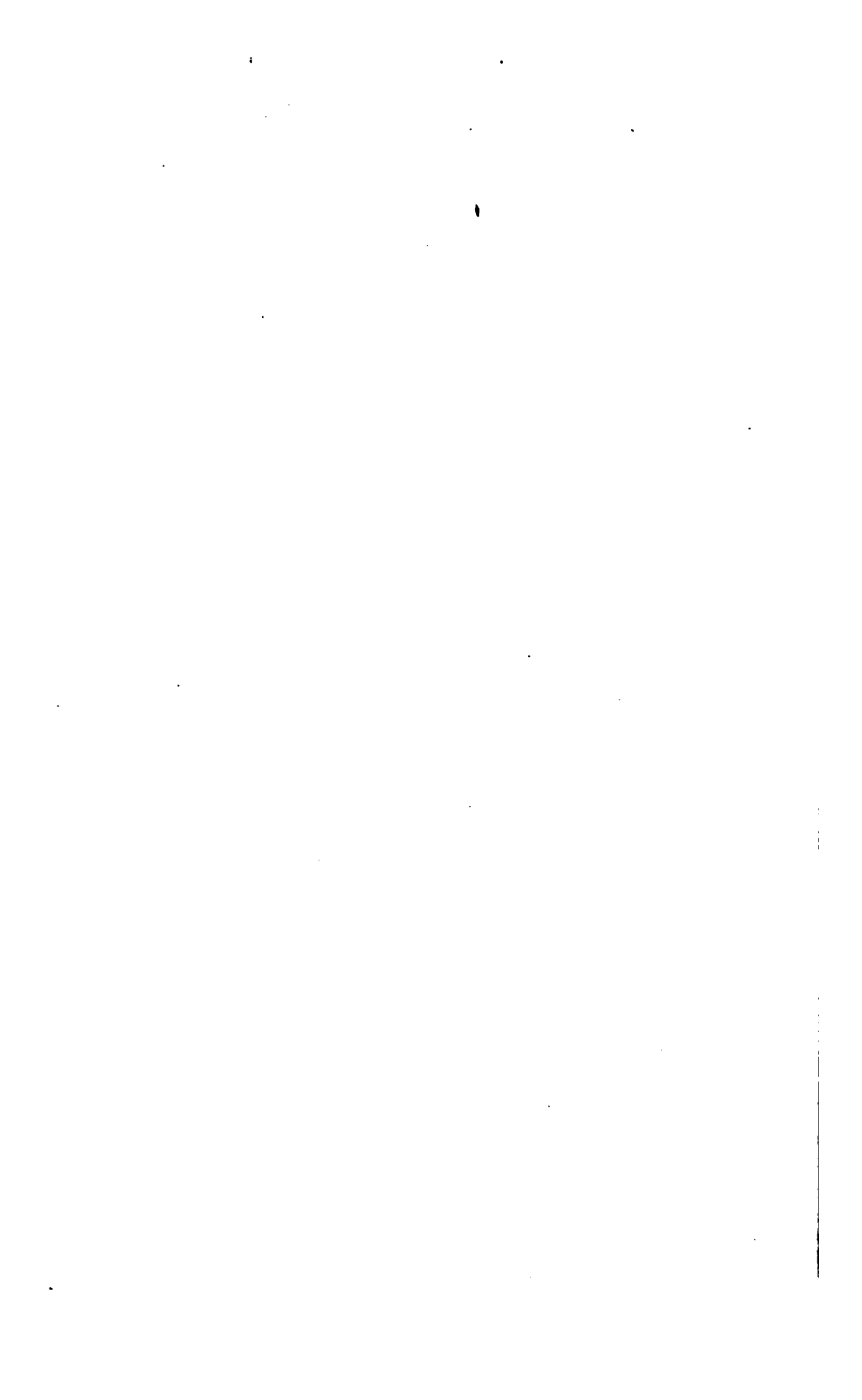
"*Public Benefit*," see CONSTITUTIONAL LAW, 7.

"*Public Officers*," see CONSTITUTIONAL LAW, 2.

WORKINGMEN'S ASSOCIATION

See CONSPIRACY.

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